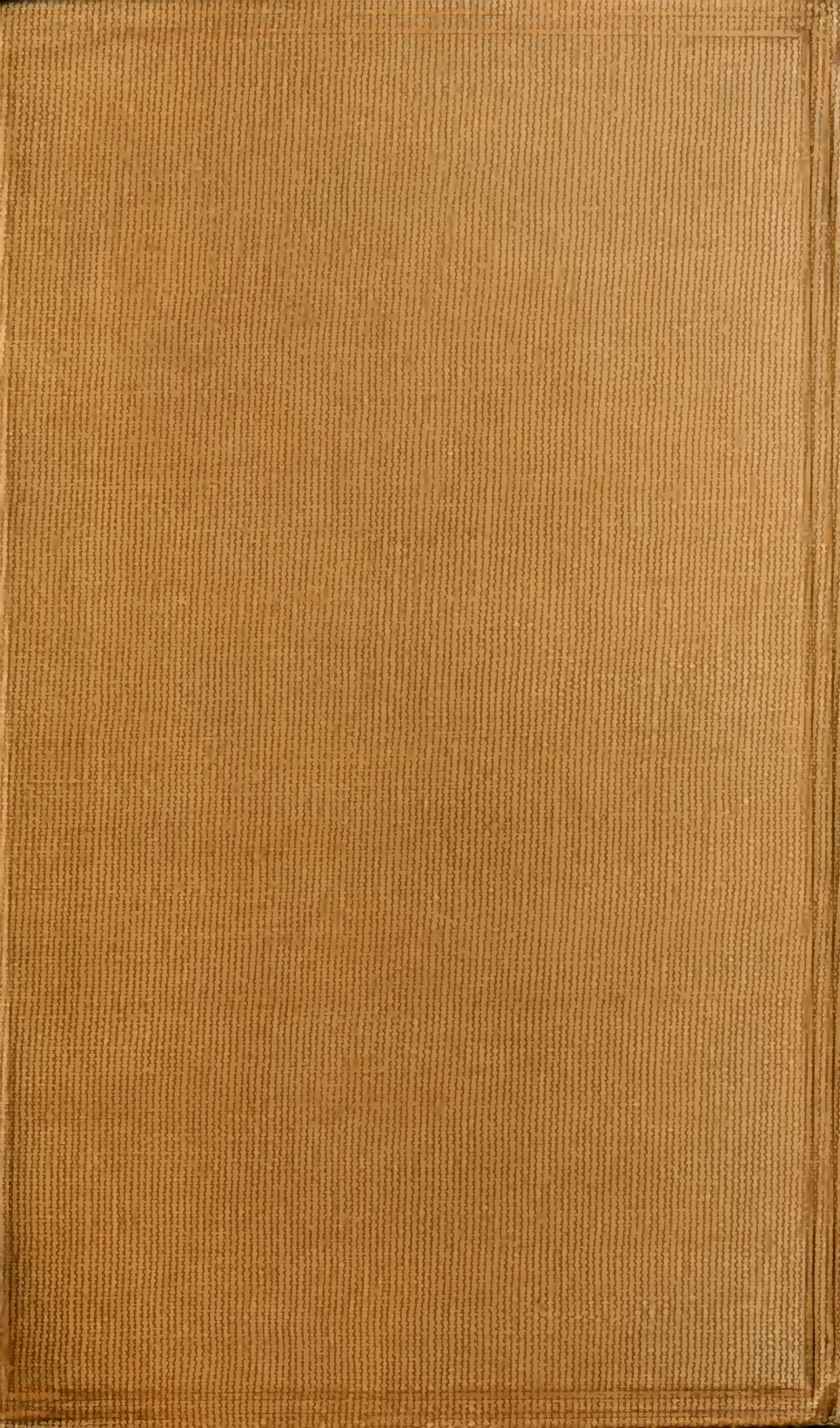






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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

BY RICHARD W. GILL, *Attorney at Law,*
AND
JOHN JOHNSON, *Clerk of the Court of Appeals.*

VOL. II.
CONTAINING CASES IN 1829-30.

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Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, do.
Hon. JOHN STEPHEN, do.
Hon. STEVENSON ARCHER, do.
Hon. THOMAS BEALE DORSEY, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

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Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. PHILEMON B. HOPPER, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

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Hon. THOMAS H. WILKINSON, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. ARA SPENCE, Associate Judge.
Hon. WILLIAM TINGLE, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

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SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

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Hon. THOMAS KELL, do.

OF BALTIMORE CITY COURT

Hon. NICHOLAS BRICE, Chief Judge.
Hon. WILLIAM M'MECHIN, Associate Judge.
Hon. ALEXANDER NISBET, do.

ATTORNEY GENERAL.

ROGER B. TANEY, Esquire.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

DECEMBER TERM, 1829.

BRUNDIGE, *et al.* vs. POOR, *et ux.*

A feme covert, in consideration of a creditor of her husband giving him further time to pay his debt, executed a deed jointly with her husband, in form a mortgage, of real estate, to secure its payment. This deed was not acknowledged according to the Acts of Assembly in relation to conveyances of land by *feme covert* grantors, nor did it purport to be in execution of a power reserved to her, but being for property, in fact held in trust for her separate use, which she had a right to convey as a *feme sole*, was considered in equity as creating a specific lien, and enforced accordingly.

APPEAL from a decree of the Court of Chancery. The bill, which was filed on the 11th of December, 1821, stated that *Dudley Poor, and Deborah, his wife*, of the city of *Baltimore*, being indebted to the complainants, *James Brundige, Thomas Vose, and William Worthington*, in a large sum of money; for the purpose of securing the same, on the 12th day of June, 1819, conveyed to them, by way of mortgage, a lot of ground in the said city, with the buildings, &c. thereon, with a clause of redemption, in case the money thereby intended to be secured, should be paid on the 4th day of October, then next following. That *Dudley Poor* hath become insolvent, that a certain *Matthew McLaughlin* is his permanent trustee, and that no part of the mortgage debt hath been paid. *Prayer*, that the defendants may be decreed to pay complainants debt, with costs, or in

default thereof, that the mortgaged premises may be sold, and for general relief.

The answer of *McLaughlin* admitted that he had been appointed permanent trustee for the benefit of the creditors of *Poor*, and that he had paid no part of complainants debt, principal or interest.

The answers of *Poor* and *wife* admit the execution of the mortgage, as charged and exhibited with the bill; but “by way of plea and answer,” they set forth the following facts, as grounds of defence. “They say, that the defendant *Deborah*, as one of the heirs and devisees of *John O'Donnell*, deceased, was entitled to a large real and personal estate, which, by an order of the Chancery Court, was allotted to her, as will appear by referring to the proceedings on record, which they ask to have taken as a part of their answer. That after the said allotment, the defendants, by a deed, duly executed, &c., and dated on the 4th of August, 1816, conveyed to a certain *Columbus O'Donnell* and *John H. Poor*, all their estate and interest in the share aforesaid, in trust, for the sole and separate use, benefit and behoof of the said *Deborah*, for life, so that she be suffered to take and receive the entire profits thereof to her own separate use, without being subject to the control of the said *Dudley Poor*, or of any future husband of the said *Deborah*, and in nowise answerable for the payment of his or their debts or engagements; and subject to be sold and conveyed by the said *Deborah* absolutely, in such manner as she may think proper, without the concurrence of her present, or any future husband; and after the death of the said *Deborah*, then as to the whole of said property, or such parts thereof as may then be undisposed of, by her deed or contract, in trust for her children as tenants in common; and in case she should die without children, for the use of such person or persons as she, by a writing in the nature of a will, may appoint, and in default of such appointment, to the right heirs of the said *Deborah*. And they further say, that the real estate mentioned in the mortgage, is included in the said

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trust deed—and by way of *plea*, and in bar of the complainants right to recover, they say they are advised they had no legal right to make said deed, and that no legal interest was thereby conveyed to the complainants, the legal title being outstanding in the said trustees, *Columbus O'Donnell* and *John H. Poor*; and moreover, that the said deed of mortgage is defectively executed, and even if a legal or equitable title existed in these defendants, that the said deed exhibited by the complainants, with their bill, is wholly defective in its execution, and agreeably to the laws of *Maryland* conveys no legal or equitable title to the complainants," &c.

Leave was afterwards prayed for, and granted, to amend the bill, by making the said trustees, *Columbus O'Donnell* and *John H. Poor*, defendants, against whom, together with the other defendants, the same relief was prayed as by the original bill.

The answers of the defendants to the amended bill, admitted the execution of the deed of trust, &c.

The original mortgage to the complainants was filed as an exhibit with the bill. The clause of redemption is, "that if the said *Dudley Poor* and *Deborah Poor*, his wife, their heirs, &c. shall pay to the said *James Brundige*, &c. the sum of \$2059 75, on or before, &c., then this indenture shall cease," &c. It was acknowledged by the grantors on the day of its date, before two justices of the peace, without a privy examination of the wife being certified on the mortgage.

The general replication to the answers was entered by the complainants.

A commission issued by consent to take testimony, but the proof returned does not appear to be material.

The complainants again, on the 14th of October, 1825, amended their bill, charging that the amount intended to be secured by the mortgage from *Poor and wife* to them, is a specific lien on the property therein mentioned, by reason of the said mortgage deed so executed as aforesaid,

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and praying that the same may be sold for the purpose of discharging the said lien.

The answer of *Poor and wife* to this amended bill, admits the mortgage; but they state, by way of *plea and answer* thereto, all the grounds of defence set forth in their answer to the original bill; and they further say, that previous to the year 1819, the said *Dudley Poor*, as the security of a certain *Moses Poor* and *Jonas Hastings*, became indebted to the complainants, as the agents of one *John Tappan*, in the amount mentioned in the mortgage, and that the same was executed by them in consideration of the said complainants (on behalf of the said *Tappan's*) agreement to extend the time of payment of the money due them, as aforesaid, from the said *Dudley*. And they aver, that the said debt was the debt of the said *Dudley Poor*, and that the said *Deborah* did not derive any benefit, or receive any consideration therefor. And they alleged in bar of the complainants bill, that they had no legal right to make said deed of mortgage; and if they had, that the same is defectively executed, &c.

On the 13th day of November, 1826, after the coming in of the preceding answer, the complainants again, with leave, amended their bill, so as to make *John Tappan* a party complainant. In this bill, *Tappan* is stated to be the actual creditor, and re-asserting the existence of a specific lien on the property contained in the mortgage for the aforesaid debt, they pray for a sale of it, and for general relief. And at the same time the following agreement, signed by the solicitors of the parties, was filed: "The undersigned, solicitors for the parties in the above cause, do hereby agree, that *John Tappan* shall be deemed and taken as a party complainant, in the original and amended bills of complaint filed in this cause, in the same manner, to all intents and purposes, as if the said *John Tappan* had been inserted as a complainant in the same, at the time the said bills were filed and exhibited in this Court. It is further agreed, that the depositions, proofs, and proceedings heretofore had, shall be read in evidence in this cause in the same manner

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as if the same had been taken after the filing of the answers in the said cause, and issue had been joined thereon. It is further agreed, that the said complainants shall have leave to file their amended bill, making the said *John Tappan* party complainant, and that the answers heretofore filed, shall be taken as answers to the said amended bill, and the depositions, proofs and proceedings heretofore had, shall be read in evidence in this cause, in the same manner as if the same had been taken, filed, and entered, after the filing of the said amended bill, and issue joined thereon."

BLAND, Chancellor, (September, 1826.)

The original bill, filed on the 11th of December, 1821, alleges that *Dudley Poor* and his *wife*, on the 12th of June, 1819, mortgaged certain property to the plaintiffs, to secure to them the payment of the sum of \$2057 57, on the 4th of October then next. And it also alleges, that *Dudley Poor* applied for and obtained the benefit of the insolvent laws, and that *Matthew McLaughlin* was appointed his trustee. On the 9th of December, 1823, the plaintiffs having obtained leave, amended their bill, by which amended bill they allege that *Dudley Poor* and *wife* have conveyed the mortgaged property to *Columbus O'Donnell*, and *John H. Poor*, in trust for the use and benefit of *Dudley Poor's wife*, of the nature of which they were ignorant; and therefore pray that those trustees may be made defendants, and that they may be ordered to produce the deed of trust.

These complainants, still not being entirely satisfied with their bill, obtained leave, and again amended it on the 14th of October, 1825. By this amendment they allege, that they are entitled to be paid out of the sale of the mortgaged property, on which they have a specific lien, by reason of the mortgage deed; and, in the opinion of the plaintiffs, their bill still requiring amendment, on the 13th of November, 1826, they obtained leave, and so amended it as to make *John Tappan* a plaintiff, who, as is alleged by this amendment, is, in truth, the real creditor, and that *Brundige, Vose*,

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and *Worthington*, in whose names the mortgage had been taken, were merely his agents.

The plaintiffs pray for a sale of the mortgaged property to pay the debt, and for general relief.

To the original bill, on the 13th of March, 1822, *McLaughlin*, the trustee, under the insolvent laws, of *Dudley Poor*, answered and admitted all its allegations. On the 16th of December, 1822, *Dudley Poor* and wife, jointly pleaded in bar, that the mortgaged property had been previously conveyed to *Columbus O'Donnell*, and *John H. Poor*, in trust for the uses specified in the deed of trust, and therefore that the mortgage relied on by the plaintiffs, was insullicient and void. On the 3d of August, 1824, *O'Donnell* and *John H. Poor*, by their joint answer, admit the execution of the deed of trust, and produce it as required by the first amended bill. After the amendments of the bill of the 9th of December, 1823, and of the 4th of October, 1825, *Dudley Poor* and wife again jointly pleaded, that they had, by a deed bearing date on the 4th of August, 1826, conveyed certain property therein described, including that in the proceedings mentioned to *Columbus O'Donnell*, and *John H. Poor*, in trust for the separate use of *Dudley's wife*, and for the uses mentioned in that deed; and then aver, and plead, that the mortgage deed for a part of the property which had been so conveyed in trust, is defectively executed, and that they had no legal right or power at that time to make such a contract, for that property. After which it was agreed that these answers, should stand as answers to the third amendment of the 13th of November, 1826. The general replication has been filed, issue joined, and the case standing ready for hearing, has been fully argued. The deed of trust of the 4th of August, 1816, was produced, commented upon, and its execution and verity on all hands entirely admitted. I have thus particularly stated the circumstances of this case, because the statement itself leads us directly to those well established principles upon which it may be at once disposed

of, without the least difficulty, and without being carried away into that group of decisions in relation to the execution of a power reserved to a *feme covert*, that have tasked the diligence, and exercised the ingenuity of so many distinguished lawyers; since there is no allegation in these pleadings, by which the court can be called upon to treat the mortgage, upon which the plaintiffs sue, as an execution of the powers with which the wife of *Dudley Poor* has been clothed by the deed of trust. The case is simply this: the plaintiffs say, that to secure a debt due them, they obtained a mortgage of certain property from *Dudley Poor* and *wife*, which property they pray may be sold to pay that debt. To this *Dudley Poor* and *wife* plead in bar, that they had no legal right or power to make such a mortgage, for the reasons set forth. To this the plaintiffs have replied, generally, and issue has been joined, and the case set down for hearing. Where the defendant files a plea in bar, if the plaintiff conceives it to be defective in form and substance, and is anxious to have that matter determined, he may set the plea down for hearing, and take the judgment of the court upon it. But if the plaintiff allows the plea to be correct, or it is so determined to be by the court, he may then reply and join issue upon the truth of the facts therein set forth; and if, upon the hearing, the defendant establishes the truth of the facts thus put in issue, the suit is at an end, so far as the plea extends. It is too late, after issue joined, to inquire into the formality of the plea, or whether it be in any respect defective in form: or whether any, and how far an answer might be necessary to its support, because the plaintiff, by replying to it, has thereby tacitly waived all objections of that sort, and admitted it to be a good bar in equity, if the facts be true. And it is the constant course of the court where issue has been joined on the plea, and its truth is proved or admitted, to dismiss the bill with costs, if the plea goes to the whole. In this case, the plea of *Dudley Poor* and *wife* covers the whole and entire substance and merits of the plaintiff's case, and

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having been admitted by the replication to be good in point of equity, and the truth of the facts therein set forth having been established, there is an end of the plaintiff's case.

DECREED, that the complainants bill of complaint be dismissed, with costs.

From which decree the complainants appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN and ARCHER, J.

Moale, for the appellants, contended, 1. That the deed or instrument of writing dated June 12th, 1819, from *Poor* and *wife*, to *Brundige, Vose* and *Worthington*, created a lien in equity on the property therein mentioned, and the complainants have a specific lien thereon, to the amount of the sum of money mentioned in said deed, and intended to be secured thereby. 2. That the deed of trust executed by *Poor* and *wife*, on the 24th of August, 1816, to *Columbus O'Donnell* and *John H. Poor*, grants to *Deborah Poor* full power to contract for, and dispose of, the said property, and by the trusts mentioned therein there is reserved to the said *Deborah* the power of disposition thereof. 3. The answer and plea filed by the said *Poor* and *wife*, do not bar the complainants from the relief sought by them. 4. The Chancery, in dismissing the complainants bill, erred in not dismissing the same without prejudice.

He cited in his argument, *Beames Eq. Plea.* 339, 240. *Harr. Ch. Pr.* 599. *Milf.* 238. *Beames Eq. Plea.* 41. *Milf.* 177, 239. *Chase vs. McDonald and Ridgely*, 7 *Harr. and Johns.* 176, 198. *Price and Nisbet vs. Bigham*, *Ib.* 298. 3 *Johns. Ch. Rep.* 77. *Jacques vs. Trustees of the Methodist Church*, 17 *Johns. Rep.* 518. *Woods vs. Fulton and Starck*, 4 *Harr. and Johns.* 329. *Smith and others, vs. Everett and others*, 4 *Bro. Ch. Rep.* 64. *Ex parte Wills*, 1 *Ves. Jr.* 162. *Legard and Hodges*, *Ib.* 477.

Winchester, for the appellees. 1. This is a bill to foreclose a mortgage, and nothing else; the original and amended bills have all this character, and the appellants now ask for relief, not warranted by the bill. Under the general prayer, they are only entitled to such relief as is consistent with their bill. The object of the bill, then, being to obtain a sale of mortgaged property, and its specific prayer looking alone to that object, they cannot now be allowed to ask for the execution of a contract, defectively executed. A bill made for one purpose, cannot be applied to another. *Chalmers vs. Chambers*, 6 *Harr. and Johns.* 29. 2. The deed of trust from *Poor and wife*, to *O'Donnell and John H. Poor*, was founded upon a meritorious consideration; and the complainants can have no equity as strong as that of the wife. The whole question, then, is on the validity of the mortgage, which he contended was void at common law, and under the act of Assembly, and that it was not an execution of the power under the deed of trust. The mortgage was void under the act of Assembly, because the wife was not examined privately, and apart from her husband. It is no execution of the power reserved to her by the trust deed. It does not refer to that deed, or manifest an intention to execute the powers with which it clothes her. Such powers must be strictly executed, especially in the absence of a valuable consideration. 1 *Madd. Ch.* 44, 45. *Colter vs. Layer*, 2 *P. Wm.* 623, 624. 1 *Scho. and Lef.* 62, 63.

This is not such a defective execution of the power, as a court of equity will aid. It was, at most, a voluntary assignment, without consideration, and there is nothing *on the face* of the instrument indicative of an intention to execute the power. 3. The appellees are concluded by the plea, the legal sufficiency of which, they have admitted by the replication. *Chase vs. McDonald & Ridgely*, 7 *Harr. and Johns.* 181.

Taney, Attorney General, on the same side.

1. The legal sufficiency of the plea being admitted by the replication, and the facts being established, the plaintiff's bill must be dismissed. *Milf. Plea.* 241. *Chase vs. McDonald & Ridgely*, 7 *Harr. and Johns.* 198.

2. The bill claims relief, not on the ground of a separate estate of the wife, but upon a mortgage executed by husband and wife, for a debt due from husband and wife; without reference to any separate estate of the wife, or any power to mortgage by virtue of the deed of trust. In order to obtain relief on such a bill, he must show a mortgage of a legal or equitable estate, executed according to the act of Assembly, so as to bar the right of a *feme covert*. He cannot support the case he has stated, by shewing the execution of a power by the wife, or a contract to mortgage her separate estate, by virtue of a trust for her separate benefit; for either of them would be a different ground of relief, and a different equity, from the one he has stated.

The mortgage is not properly acknowledged to bind a *feme covert*, nor would it bind her, being a *feme covert*, as a contract to mortgage, independent of her separate interest under the deed of trust—and as that interest is not alleged in the bill, and her interest under the deed of trust is not stated as a ground of relief, the case charged in the bill, fails in the proof, and the bill must be dismissed.

3. If, under the statement in the bill, the deed of mortgage can be relied on, as the contract of a married woman to mortgage her separate estate, and as thereby creating, by her contract, a specific lien on her property, it ought to have been so charged in the bill; and the deed of trust, giving her the power, should have been set forth, and the consideration for the contract stated, so as to shew the equity of the complainants to claim the execution of the agreement to encumber, against *Mrs. Poor*. *Chalmers vs. Chambers*, 6 *Harr. and Johns.* 29. *Coop. Eq. Plea*, 13, 14.

In the case of *Price and Nisbet vs. Bigham*, 7 *Harr. and Johns.* 296, the contract to charge the land with the debt was

set out, and the consideration for the agreement fully stated, and the contract and consideration proved, as stated in the bill. In this case, nothing is charged but the mortgage, and the specific lien is alleged to arise by reason of the mortgage, and no other contract but a mortgage is stated; and the equitable consideration of a joint debt from husband and wife, charged in the bill, is not proved.

4. If the facts were all proved, there is no equity upon which the complainants can claim a specific execution; it was the separate debt of the husband, and due from him as security.

5. The instrument called a mortgage, does not profess to be the execution of the power reserved in the deed of trust; and does not appear, and is not alleged to have been so intended.

Williams, (District Attorney of U. S.) in reply.

The relief we ask, is conformable to the case made by the bill. Our prayer is, that the specific property may be sold, and the case made by the bill is such, as to justify this prayer. The instrument of writing which furnishes the foundation of the complainants bill, though called a mortgage, is but an equitable contract. The case in 6 *Harr. and Johns*. 29, relied on, on the other side, is not analagous to this; there, the prayer of the bill was to have the deed recorded, and the decree ordered a sale of the property. The relief granted was entirely different from the case stated in the bill, and from the relief prayed. This bill has a double aspect; it asks that the mortgage may be considered a specific lien, and also for a sale of the property.

Whether the defence set up, be a plea or answer, the doctrine asserted by the Chancellor is not law in this State. *Chase vs. McDonald & Ridgely*, 7 *Harr. and Johns*. 170, 176, 178, 181, 197, 198. It is, however, no plea, possesses none of the forms or features of a plea, either in its commencement or conclusion. *Beames Eq. Pleas*, 333 to 349, 40, 42, 44, 48, 49. *Mitf.* 300, (*Ed.* 1827,) 299, 219, 294,

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300. *Ham. Dig.* 427. *Coop. Plea*, 223, &c., 229, 231. *Ferguson vs. O'Hara*, 1 *Peters Cir. Court Rep.* 493. *Saltus and Saltus vs. Tobias and Seaman*, 7 *Johns. Ch. Rep.* 214.

If the defence was originally a plea, the agreement signed by the counsel deprives it of that character; for that agreement expressly says, it shall be taken as an answer.

The mortgage deed is not merely voluntary, as is alleged on the other side; it was made for a valuable consideration. That married women can transfer their separate estate, he referred to 3 *Johns. Ch. Rep.* 129, 144. *Price and Nisbet vs. Bigham*, 7 *Harr. and Johns.* 296. 3 *Johns. C. Rep.* 77, 7 *Harr. and Johns.* 296.

The deed is good as a mortgage of an equitable estate, and was properly executed; the trust deed rendering a private examination unnecessary. 3 *Johns. Ch. Rep.* 77, 89. *Jacques vs. Methodist Church*, 17 *Johns. Rep.* 577. 17 *Johns. Rep.* 577. But if the deed is defective, a court of equity, under the circumstances of this case, has the power, and will cure the defect. *Methodist Church vs. Jacques*, 1 *Johns. Ch. Rep.* 75. 1 *Madd. Ch.* 44, 45. *Hunt vs. Rousmaniere*, 1 *Peters Rep.* 13.

ARCHER, J. delivered the opinion of the Court.

The decision in *Tiernan vs. Poor and wife*, at the last term of this Court, has settled the principal questions upon which this cause must turn.

From the doctrines there maintained, *Mrs. Poor* possessed a right to encumber her property by deed, or contract, provided the same should be founded on a sufficient consideration.

It was further decided, that although the paper, purporting to be a mortgage, and which was the foundation of the suit, was not acknowledged according to the provisions of the acts of Assembly, whatever might be the effects of such omission, in taking from the instrument the character, technically speaking, of a mortgage, yet that equity would treat

it as a mortgage, so far as to authorise a Court of Chancery to decree a sale of the property, covered by it, for the payment of the debt it was executed to secure.

Taking the facts stated in the bill as true, there would be a sufficient consideration upon which to ground the complainant's bill; for that avers, that the defendant being indebted, executed the mortgage.

Admit the facts in the answer to be true, and a sufficient consideration is also manifested. There it is stated, that the mortgage was executed by *Poor and wife*, to secure to *Tappan*, one of the complainants, a debt which *Poor* owed him, and that it was made in consequence of *Tappan's* agreeing to extend the time of the payment of *Poor's* debt. *Tappan's* agreement to extend the payment, in consideration of the receipt of the mortgage, furnished a sufficient consideration to sustain the complainant's equity.

All the material allegations of the bill are admitted by the answer. In addition to a sufficient consideration as above stated, it is admitted that the instrument was executed. With these admissions, the instrument becomes, in the language of the bill, a specific lien on the property it covers.

There is, however, one fact averred in the bill, which is not admitted in the answer,—the joint indebtedness of the husband and wife; but that cannot be material, because the equity of the complainant is the same, whether the allegation that they were jointly indebted, be true or not. The real and only controversy is this: does there exist a specific lien on the property? and that the lien exists, whether they were jointly indebted, or whether *Poor* was indebted, and they jointly executed the instrument in consideration of forbearance.

It is not necessary to express any opinion as to the effect of replying to a plea, because we do not consider there is any plea filed in the cause. The paper filed by the defendant, which he indiscriminately calls a plea, and an answer, we consider as nothing more than an answer; and it is perfectly apparent from the proceedings in the cause, and from

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the agreement of counsel, which constitutes a part of the cause, that it was so considered and treated by them.

The decree of the Chancellor is REVERSED, and the cause remanded to the Court of Chancery, that a sale of the property may be there decreed, to satisfy the debt of the complainants.

DECREE REVERSED.

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The real estate of an intestate was adjudged incapable of division, and elected to be taken at the appraisement per acre, under the act of descents, by one of the heirs, who gave his bonds accordingly, conditioned to pay the co-heirs their several proportions of the appraised value of the land. Such heir, who was also the administrator, in consideration of retaining the amount of the intestate's debts to be paid by him, out of the proceeds of the real estate, delivered over the intestate's personal property to his co-heirs. It was afterwards discovered, that the land fell short of the estimated quantity, on which the appraisement was founded. In this case, a bill in equity, in which all the co-heirs were made defendants, was held to be a proper mode of obtaining relief, as well to rectify the error in the estimate of the land, as to obtain credit for the debts paid; which payments, if they exceed the proceeds of the land, may, as essential to full relief, be recovered back.

Upon the establishment of such a case, it is the duty of the Chancellor to direct the auditor to state an account between the parties; and the order to the auditor should invest him with the usual authority of taking testimony, upon the subject matter of the account.

The objection that a bill is multifarious, should be raised by a demurrer, before answer; filing an answer, and going into an examination of testimony, as to the merits of the whole matter in controversy, is a waiver of that objection.

If a bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief.

An agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him, to the creditors of the deceased, beyond assets, is the subject of a special action on the case at law, not of a bill in equity.

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainant, (now appellant.)

The case is fully stated in the opinion delivered by this Court.

BLAND, Chancellor, (March Term, 1827.) The late *Thomas Gibbs* died in the year 1811, seized in fee of a parcel of land, which descended to these parties, or his children and heirs; to whom, by his testament, he gave the personal property of which he died possessed. And he left a widow, the mother of these parties. Some time after the death of the father, it was agreed among his widow and children, that the widow should reside on the land during her life or widowhood; and hold it, together with all the personal property of the deceased, during that time; that these defendants should also be permitted to reside on the land during their celibacy; and, that from the whole of the deceased's estate so held together, and from the cultivation of the land, the widow and the defendants should have a maintenance; and the residue of the rents and profits should be applied to the payment of the debts of the testator. The whole estate was held according to this agreement, until the latter part of the year 1815, when the widow died. In the fall of the year following, these parties made a distribution among themselves of the whole of the testator's personal property. The real estate which had descended to them, having been found incapable of division, without loss, this plaintiff, under the sanction of a judicial proceeding, instituted for the purpose of effecting a partition, elected to take the whole; and gave his bond, according to law, for the payment of the shares to which the other heirs were entitled; their sister *Julia* being then alive, but who has since died unmarried, intestate, and without issue. *Elizabeth Clagett*, one of these defendants, brought suit, and obtained judgment against this plaintiff, for the whole amount of her share. After which it appeared, on a re-survey, that the land descended and so taken by the plaintiff, was deficient in quantity.

Upon this state of things this bill was filed. In the *first* place, the complainant alleges that the land was estimated to contain a greater number of acres than it really did; that his bond, on which *Elizabeth Clagett* had obtained judgment, having been given on this erroneous estimate, he is entitled to an allowance for the deficiency; and therefore, he prays that she may be enjoined from suing out execution. This alleged deficiency being admitted by the answer, upon the motion to dissolve the injunction which had issued, a credit was directed to be given on the judgment, for that amount, and the injunction was dissolved as to the residue. This branch of the case is simple and clear. But then it is confined exclusively to the complainant, and this one defendant, *Elizabeth Clagett*, alone. It extends no farther; nor can it in any way affect either of the other defendants with any bearing of the injunction, which is the only equity upon which *Elizabeth Clagett* was brought in to answer it.

But it appears from the bill and exhibits, that there are other branches of this case, which are extended indiscriminately or jointly, to all the defendants. In the *second* place, the plaintiff alleges, that he managed the affairs of these defendants, and took care of their property; and he accordingly claims a compensation for his stewardship. *Thirdly*, he alleges, that he paid the costs of the judicial proceedings for the partition of the land, and the expenses of surveying it. For these sums he claims reimbursement, as for so much money lent and advanced, to the use of the defendants. *Fourthly*, he alleges, that it was agreed by these defendants, that he should be allowed out of the money which would be due from him, for the real estate he had elected to take, all sums which he should be entitled to out of his father's personal estate. And *lastly*, he alleges, that it was agreed he should be allowed, by way of set off for all sums, with which he should be credited by the Orphans' Court, as administrator of his father, and for all claims against his father's estate, which he had paid, or should pay; that he has paid debts due from his late father, to a much

greater amount than the assets which came to his hands ; and therefore, now calls on these defendants to refund.

And for the purpose of obtaining a final decree, covering each of these several branches of his whole case, he prays specifically, that the defendants may account with him in the premises.

It was urged, that this was a proper case for an account ; that it could not be correctly understood, and determined, without an account ; and that this was the proper stage of the proceeding to ask for a decree to account. If I could be satisfied that this was a case in which the parties were entitled to ask for a decree, to account ; or if I could look forward to any relief which I might give on having an account stated, I should not hesitate in sending the case to the auditor, either by a formal decree or a common order, to have an account stated. But I cannot see that the plaintiff would be likely to obtain any benefit from the labours of the auditor.

We are told that the common law action of account has become almost obsolete ; because the parties, in all cases where that action would lie, find it more convenient to resort to a court of equity. It is then evident, that in all cases where an action of account might have been brought, the Chancellor may pass a decree to account. By the common law, and the several *English* statutes, all of which are in force here, an action of account may be maintained by any one against his bailiff, or receiver, or any one who may be regarded as such ; by one merchant against his partner, or another merchant ; and by one joint tenant or tenant in common, against his companion ; and also by and against the executor or administrator of such parties. But there is no instance of an action of account being brought by a bailiff, or receiver, *against* his principal ; nor could such an action be sustained, from the very nature of things. Now it is clear, that the defendants, in reference to the whole or any branch of this case, cannot be considered, in any respect whatever, either as bailiffs, receivers, merchants, joint ten-

ants, or tenants in common. No action of account could be maintained against them; and consequently they cannot be decreed to account.

But it may be said, that the analogous proceeding in a Court of Chancery, takes a different and a much more comprehensive scope than the common law action of account. It does so, but yet it also has its limits, and is tied down by rules. In a proper case of account in equity, it would seem that both parties are regarded as actors, as reciprocally plaintiff and defendant; since it is certain, that if it should appear from the auditor's report, made in pursuance of a decree to account, that the plaintiff was indebted to the defendant, a final decree might be passed for such balance, in favor of the defendant against the plaintiff. But there could be no such judgment at law, in an action of account, against the plaintiff. In this case the plaintiff specifically prays, that all his claims may be set off against the amount due by him to the defendants, for the land he had elected to take. But it is a settled principle of equity, that a party cannot be permitted to come here merely to obtain the benefit of a set off. If his claims are susceptible of legal proof, and are such as may be set off, his remedy is at law, and not in this court. But in addition to those cases where an action of account would lie at common law, this court can only decree an account where there are mutual demands, and a series of charges on the one side, and a variety of payments on the other; not merely a single payment or receipt; or where the defendant is chargeable as a trustee. And although in most cases where there are mutual demands, an action of *assumpsit* would lie, yet since the subject cannot be so well investigated in such an action, a Court of Chancery will decree an account.

Upon these principles, where an insurance broker by his bill asked for discovery and an account of money paid and received by him on account of the defendant, and money due to him for commission, postage of letters, and upon notes endorsed to him, it was dismissed. And so too,

where a mechanic who had contracted to build a house, after he had performed the work, claimed a balance, giving credit for several partial payments, and brought a bill for an account, it was dismissed. In both these cases it was held, that the remedy at law was complete, and therefore the complainants could not be allowed to bring their cases into a Court of Chancery.

Now in whatever way this case may be considered, either altogether or on any one branch, there are not accounts on each side. The defendants have, each of them, but one claim; and these claims of theirs are not held by them in common, but by each, in severalty. There is but one single transaction; no mutuality of dealings, no variety of accounts. Nor can these defendants be considered for any purpose whatever, as trustees.

On the other hand, there is indeed a sufficient complexity and diversity in the plaintiff's claims. The *first* of them is for an allowance for the deficiency in the quantity of the land he had elected to take; and it is admitted; but it is only a proportional deduction which he is entitled to have from each defendant, individually, not conjointly. It is a claim by the plaintiff, in his own capacity as obligor, against each defendant as obligee. The *second* is for services rendered to all the defendants jointly, in the management of their joint concerns. If it be well founded in fact, it is a mere legal claim, wholly distinct from the preceding, and of an entirely different nature. But it has not a single characteristic trait of equity about it. The *third* is merely for money paid and advanced; and, like the *second*, is properly the subject of an action of *assumpsit*. The *fourth* is one which seems to be founded on a particular agreement; and if so, it is also properly the subject of a special action upon the case at law, not of a bill in equity. The *fifth* and last claim, is in substance, that these defendants or distributees, be decreed to refund; and this plaintiff rests either on the agreement he sets out, or on the common justice of the court. This is one of those demands which fall ex-

clusively within the cognizance of a court of equity, and cannot be enforced at all, in any form of action at law. This claim to refund, when made by a creditor, or by one legatee against another, is always treated with respect, and never rejected without substantial reasons. But when presented by an executor or administrator, as in this instance, it must be alleged, and clearly appear, that the distribution was involuntarily made, or obtained by fraud or mistake, or without any agreement to refund.

Of these several claims of the plaintiff, the *first* presents but one single item between the parties on each side; the *second*, *third* and *fourth*, present cases like that of the insurance broker, where all the accounts are on the side of the plaintiff, and where there is ample relief at law, according to the plaintiff's own showing. The *fifth* is a case peculiarly proper for a court of equity; but is not a case where the parties would be decreed to account, unless from some special circumstances. Although the court might order an account to be stated, if the case should require to be elucidated by a calculation or statement. There is then nothing in this case to authorise or require a formal decree, or even a common order to account.

But the case stands for a final hearing on bill, answer, general replication, and proofs; and since an interlocutory decree to account cannot be passed, it must now be disposed of by a final decree.

The bill upon its face is multifarious. The five several claims of the plaintiff are not only separate and distinct in themselves, wholly unconnected with each other, but they are essentially different in their extent, nature, and character. The *first* is confined to the single question, what is the amount due from the plaintiff to each defendant. The *second* and *third* are merely legal claims against all the defendants, and are the subjects of actions upon the case at law. The *fourth* is founded on a special agreement, is wholly distinct from the rest; and the proper remedy, if any, is at law. And the *fifth* is a claim which could only

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be sustained in this court; is distinct in its nature, and of a character wholly different from all the others. The *first* claim, as against each defendant, it is true, originates from the same source, but the case of no one defendant is necessarily blended with the other. The four last claims have no sort of connexion with each other; but that of these same defendants being the joint party on the one side to them all.

The several component parts of the complainant's case are most unhappily incongruous, or incompatible with each other. One part consists of matter in which the defendants are not necessarily connected; three others belong exclusively to the courts of common law, and the *fifth* presents a case in which the party can only be relieved in a court of equity: these matters are apparent on the face of the bill. It is essential that there should be, to a certain extent, and at least apparently, a consistency and coherency in the several component parts of the plaintiff's case, as set out in his bill. And the entire case, the several parts of which have been so improperly blended, as exhibited by the bill, (notwithstanding it may have been answered,) should appear at the hearing to be of a character to confer jurisdiction on a court of equity. Upon the whole, this bill cannot in any manner be sustained.

DECREED, that the complainant's bill of complaint be dismissed, with costs.

From this decree the complainant appealed to this court.

The cause was argued before EARLE, MARTIN, and DORSEY, J.

Brewer, Jr. for the appellant, contended, 1. That the complainant below has no remedy at law; at least no adequate, plain, and simple remedy for the recovery of his demands. That neither of them could be set off at law against his bond to the State for the use of the defendants, either by the common law, under our acts of Assembly, or under the

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agreement proved in the cause, nor could an action at law be sustained for the recovery of them; and if they could be recovered at law, it would not afford an adequate, plain, and simple remedy. 6 *Bac. Ab.* 135. *Montague on set off*, 68, *App.* 5. *Cox vs. St. Bartholomews Hospital*, 8 *Ves. jr.* 140. *Maugham vs. Mason*, 1 *Ves. jr.* 416. *Earle vs. Hinton*, 2 *Str.* 732. *Ludlow vs. Simond*, 2 *Caines Cas.* 38. 2. That the complainant's claim to be repaid out of the real estate, what he had overpaid of the personal estate, as representing the creditors so paid; or that the defendants, as distributees, should refund, are both clear matters of equitable jurisdiction. *Tyson vs. Hollingsworth*, 1 *Harr. and Johns.* 470. 3. That the complainant's claim to be allowed for the deficiency of the land, is a clear matter of equitable jurisdiction; his right to the allowance being admitted by the answer. 4. That the want of jurisdiction of the court, ought to have been taken advantage of by demurrer, and cannot be taken advantage of at the hearing. *Conner vs. Drury*, 2 *Harr. and Gill*, 220. *Underhill vs. Van Cortlandt*, 2 *Johns. Ch. Rep.* 369. *Ludlow vs. Simond*, 2 *Caines Cas.* 38, 40, 52. *Livingston vs. Livingston*, 4 *Johns. Ch. Rep.* 290. *Burgess vs. Wheate*, 1 *Eden's Rep.* 190. 5. That the matter of the complainant's claim is not multifarious, but flows from one source, and every item is a part of the *res gesta* of the same transaction, and is joint against all the defendants. 6. That multifariousness in the bill should be taken advantage of by demurrer, and cannot be objected at the hearing. *Berke vs. Harris*, *Hard. Rep.* 337. *Ward vs. the Duke of Northumberland*, 2 *Anstr.* 469. 2 *Madd. Ch.* 234. *Milf. Plead.* 147. 7. That the bill should not have been dismissed *in toto*, some of the claims asserted thereby, being within the jurisdiction of the court.

Shaw, for the appellees. In 1811, the father of the complainant and defendants died intestate, as to his real estate. Letters of administration were granted on his personal

estate to the complainant, who in 1816 admitted that the whole estate was settled, and made distribution among the representatives, of their several portions of the personal estate in specifics. In 1818 he applied for a partition of the real estate, which not being susceptible of division, he elected to take the whole, and gave his bond for paying to the other heirs their proportions of the value of the estate. *Mrs. Clagett*, one of the heirs, recovered judgment for her share. For the first time, in 1824, the complainant, by his bill, claims for having overpaid the estate. He passed no account with the Orphans' Court, until just at the time of filing his bill in this case. He claims for interest on monies paid up to the time of passing his account; also for attending the farm, and for money lent and advanced, &c. Why did he make distribution among the representatives, without informing himself of the debts being all paid? The injunction in this case could only have been granted on the ground of deficiency of the land, the complainant had elected to take. If he had any claim against his sisters, it was recoverable at law against them separately for money paid them, for money overpaid the estate, and for superintending the farm. His counsel admits that his claim was neither a legal nor an equitable set off at law; nor is it in equity. There is no allegation in the bill, of a deficiency of personal assets to pay the debts of the deceased. Another of his claims is for commissions as administrator, which was not allowed by the Orphans' Court. It was for that court, and for no other court, to make the allowance for commissions.

DORSEY, J. delivered the opinion of the court.

The bill states that *Thomas Gibbs*, late of *Anne Arundel*, died seized of a tract of land called *Gibbs' Inheritance*, which the complainant and his sisters, the defendants, inherited in *co-parcenary*. That it was appraised under the act of descents, in virtue of proceedings in *Anne Arundel* County Court, and being adjudged incapable of division, the

complainant elected to take the same at the appraisement, and accordingly gave bond to the State of Maryland, in the penal sum of \$3000; conditioned for the payment of \$612 75, to each of the other heirs for their proportion; the land being valued at \$15 per acre, and supposed to contain 204 acres, but that in fact, it contains but 190 acres, as appears by actual survey, since made. Exhibit A, is referred as a transcript of those proceedings, but it is nowhere to be found in the record before us. The bill further states, that *Elizabeth Clagett*, one of his sisters, hath brought suit on said bond in *Anne Arundel County Court*, recovered judgment thereon, and levied a *fi. fa.* on the property of the complainant, which is now advertised for sale. That *Thomas Gibbs* died in 1811, having first made his last will and testament, sufficiently executed and attested to pass his personal, but not his real estate, by which he devised the whole of his real and personal estate to his wife for life, giving to his single daughters a home therein, and after the death of his wife, devising the land to your orator, and imposing on him, during his mother's life, the duty of superintending the whole property for her. That after the death of *Thomas Gibbs*, the widow and her single daughters, (*Elizabeth Clagett* being the only one who had married, but was then a widow,) continued to reside on, and cultivate said land, with the consent of said *Elizabeth Clagett*, and the complainant, until the father's will was discovered about three years after his death, when it was agreed between all his heirs, that the will should have the same effect it would have had if properly executed, except so far as related to the complainant, and that in pursuance of such agreement, the maiden sisters and mother continued to reside on and cultivate said land, until her death, which happened in the fall of 1815, the complainant superintending the farm during that period. That *Thomas Gibbs* died considerably in debt, and that letters of administration on his estate, were granted to the complainant, on the 9th of August, 1814, who returned an inventory amounting to the sum of \$2717 60; and on the 6th

of May, 1816, passed his first account, in which he was credited with \$313, the amount of his commission on the inventory and some debts paid. That on the 11th February, 1819, he passed another account, in which he was credited with debts due to himself and others, amounting to the sum of \$1515 75½, and that on the 16th of October, 1824, he passed another account, and obtained credit for \$1764 65, for claims due by his father's estate, and paid by the administrator, or authorised to be retained by him for his own claims, no part of which credits were paid out of the personal estate of the deceased, although amounting to \$876 30½ more than the whole amount thereof. The vouchers for all which claims, are stated to have been filed with the bill, as are also copies of said accounts settled with the Orphans Court. The bill also states, that the complainant had paid other debts of the deceased, which he will make appear, and prays to be allowed for. And that the whole of the personal estate of *Thomas Gibbs* was, in the fall of 1816, distributed between the complainants and defendants, by persons selected for that purpose, with which distribution, all parties at the time professed to be satisfied, and still retain possession of the proportions of property to them respectively allotted. That at the time such distribution was made, it was agreed between the complainant and his sisters, that he should elect to take the land, at the commissioners valuation, and that he should be allowed out of the said valuation, all sums of money, with which he should be credited by the Orphans Court, as administrator of his father, and all sums which he should be entitled to out of his father's personal estate, and all claims against it, which he, as administrator, had paid or should pay. The defendants' by their answer, admit the proceedings in *Anne Arundel* County Court, as regards the land, the election of the complainant to take the same at the valuation, as stated in the bill. They admit also the deficiency in the quantity of the land, and that the complainant shall be entitled to a credit from each of these defendants for the sum of fifty-two dollars

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and fifty cents, being the amount of their several proportions of said deficiency. The defendant, *Elizabeth Clagett*, admits the judgment, execution and levying thereof on the property of the complainant. The defendants admit the will of *Thomas Gibbs*, and the time and circumstances attending the execution and discovery thereof, as stated in the bill, and the agreement of all the parties, that during the life time of the mother, the property should be held in the manner directed by the will; but they allege that by that agreement, “for the purpose of saving the personal property from being sold, the crops made on the land, and the whole profits of the real and personal estate, should be applied to the payment of their father’s debts.” The defendants deny that the complainant, from the time of his father’s death, continued to reside on the farm and to cultivate it, or superintend it for the use of their mother, until her death. But they charge that the complainant, during the time, and even prior to the death of their father, rented and cultivated for his own use, another farm at some distance off, and received the whole profits thereof, and that he could not have given the necessary attention to both places, and his only services were to sell the produce of the farm, and to apply the proceeds to the payment of their deceased father’s debts. The defendants then “charge that, at the time of their father’s death, there was on hand thirteen hogsheads of tobacco, part of the personal estate, which were sold by the complainant, who received the price thereof, but has not accounted for the same.” They also state, that in the year of their father’s death, there *was* made on the farm three hogsheads of tobacco, one other crop which was sold to *John Claytor*, and two other crops sold to *Richard Estep*; all of which were sold by the complainant, but are not accounted for. They also charge, that the rents and profits of the estate, received by the complainant, if fairly applied, were more than sufficient to pay their father’s debts, and they deny that any allowance should be made for the superintendence of the farm. They also state, that the complainant had the

sole use, and received the wages of two sawyers, and one plantation hand, for eight years; and that the complainant, so far from pretending, at the time of the division of the personal estate, that there was not a sufficiency to pay the debts of the deceased, then expressly stated, that the debts were all paid, except one of *William Stewart's*, of forty dollars, and that he had in his hands at that time, a balance of \$600, arising from the sales of the tobacco, and that a crop of tobacco was hanging in the house. They further state, that at the time he took from the estate the two sawyers, as aforesaid, he said their wages would pay all the debts; and the defendants deny that any part of the monies arising from the sales, ever was applied to the support of the family, or either of these defendants, but was received and expended by the complainant himself. They positively deny that there ever was, either at the time of the division of the personal estate, or any other time, any agreement or understanding, that the complainant should be allowed out of the valuation of the real estate, any sums of money whatever, for charges and credits which might be allowed him by the Orphans Court, as stated in the bill of complaint.

An injunction having issued as prayed, upon the filing of the bill: on hearing the motion to dissolve the same, after the answer came in, the Chancellor passed an order, that the injunction be “dissolved, except as to the sum of \$52 50, for which sum the said *Elizabeth Clagett*, is hereby required and enjoined to give the said *Thomas Gibbs* credit on her judgment.

Upon the return of the commissions with the testimony taken under them, the Chancellor, upon various grounds which are assigned in his decree, and which he alleges are apparent upon the face of the bill, refused to send the case to the auditor to state an account between the parties, and dismissed the complainant's bill.

To the correctness of this refusal and dismissal, we must be permitted to withhold our assent. We cannot discover

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in the bill of complaint, that multifariousness, which, in the opinion of the Chancellor, precludes the complainant from all claim to relief. It was a ground of defence not relied on by the defendants; if it had been, they should not have answered, but have demurred to the bill. To test the accuracy of this objection, we must view the question as if it arose on such demurrer, and in so doing, we at once divest it of the entire foundation on which, by the reasoning of the Chancellor, it is made to depend. The bill simply claims a deduction from the purchase money of the land for its deficiency in quantity, the cost of its survey, and the amount of the debts of the deceased settled by the administrator, and allowed by the Orphans Court; and which, by the alleged specific agreement of the parties, were to be so deducted. These credits all have reference to the same subject matter; the land or price at which it sold; and in the same degree affect the interests of each and all of the defendants. So far then from viewing them, as the Chancellor appears to have done, as so complex, incongruous, and incompatible with each other, as to vitiate as multifarious, a bill which should unite them, we regard them as so connected and blended together, that had each subject been made the basis of a distinct bill, or had separate bills for the same matters been filed against each of the defendants, a Court of Equity would, on motion, have ordered them to be consolidated. To avoid the multiplication of suits and costs in Chancery, such a consolidation would be imperiously demanded.

But suppose it be conceded that the bill is multifarious, and therefore defective; the defendants have waived all exception to the defect, by filing their answer, and going into an examination of testimony, as to the merits of the whole matters in controversy. To permit them to take advantage of such an objection, at that stage of the proceedings, would be a fraud upon the complainant, and is not reconcileable to the order, liberality, and justice which pervades that system of rules by which Courts of Chancery are governed.

If the bill, however, be liable to dismissal for multifariousness, it ought to be dismissed in *toto*, and not made the foundation of partial relief, as the Chancellor appears to have designed it to be, in ordering a credit to be entered on *Elizabeth Clagett's* judgment, for one-fourth part of the amount of the deficiency in the quantity of land, which order the decree intended to leave in full force. Nor can we perceive the soundness of the discrimination made between the complainant's right to a credit against *Elizabeth Clagett*, and against the other defendants. His equity in both cases rested upon the same admission in the answer; and if it were proper, (as we think it was) to have allowed the credit on the judgment of *Elizabeth Clagett*, an endorsement of a similar credit should have been decreed to be entered upon the bond against the respective claims of *Mary* and *Cassandra Gibbs*.

The facts presented by the record before us, do not, we think, warrant our adoption of the Chancellor's views of most of the claims preferred by the complainant. The first claim, as numbered by him, being for a deficiency in the quantity of land, is admitted to be a fit subject of equitable jurisdiction; but he insists that the claim against each defendant, is separate and distinct, and should be the subject of an independent bill. To this doctrine, the object and effect of which would be an useless multiplication of actions, we cannot subscribe. The deduction sought for being from the whole valuation of the real estate, and not from the proportion of any particular distributee: all who are interested therein, not only may, but ought to be made, parties to the bill.

The second claim, says the Chancellor, is for services rendered all the defendants jointly, in the management of their concerns, and is purely legal, not having one characteristic trait of equity about it. There is nothing in the record in this cause, from which we could infer that the complainant ever urged any such claim as that thus enumerated, as a discount from his bond. The bill certainly

prays for no such relief, nor ought the proof taken on the subject to be regarded, as indicating a design to urge such a claim. The taking of such testimony, appears to have been wholly defensive, and to have been the necessary consequence of the defence set up by the answer, which charged the payment of the debts of the deceased to have been made (by agreement of all the parties concerned) out of the rents and profits of the real estate, and not out of the individual funds of the complainant. To a correct ascertainment of which rents and profits, applicable to that object, proof of the expenses, incident to the cultivation of the land, was indispensable.

For the recovery of the third claim, as it is denominated in the decree, being for the costs of a survey, the facts in the record disclose no remedy to the complainant, either at law, or in equity.

The fourth claim says the decree is founded on a particular agreement, and is the subject of a special action on the case at law, not of a bill in equity. If this had been simply an agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him to the creditors of the deceased, the force of the Chancellor's position could not be evaded. But that is not the case before us. Here there was a special agreement, founded on an adequate consideration, that the amount of all debts of the deceased, paid by the complainant, should be retained by him out of the amount of the valuation of the real estate, of which he should elect to become the purchaser. Upon the faith, and in pursuance of this agreement, the personal estate is delivered over to the defendants. The complainant elects to take the land at its valuation, and pays the debts of the deceased. Ought a Court of Equity, under such circumstances, to stand by and permit the defendants to commit so gross a fraud upon the complainant, as to wrest from his hands the whole of that fund, which they had specifically pledged for the payment of his claims? We think not. The agreement of the parties, as

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stated in the bill, and sustained by the testimony, shews that the complainant never consented to rely on the personal responsibility of the defendants, and should not therefore be compelled to resort to it, but that he looked for indemnity and reimbursement to the purchase money of the land, on which he had a clear, equitable lien. Upon payment of debts of the deceased by the administrator, out of his own funds, equal to the whole amount due on the bonds, a Court of Equity should decree its cancellation. Upon payment to a less amount, it should decree that a credit for the same be endorsed upon the bond.

As regards the prayer of the complainant, that in case his claim should overrun the amount due on his bond, the defendants should be decreed to repay him the difference, we consider it reasonable, and that to grant it, is within scope of clear Chancery powers. Having once acquired jurisdiction over the subject matter, by ascertaining the amount due to the complainant, with a view to its deduction from the valuation of the land; the authority to grant full relief, follows as a necessary consequence.

We have gone thus at large in disclosing our views of the grounds on which the Chancellor bottomed his decree, in order to facilitate future proceedings in this cause, which must take place before him. And confining ourselves within those limits, which he professedly prescribed to himself, our remarks have been predicated upon the bill alone, without reference to the answer of the defendants, or the testimony taken under the commissions issued for that purpose. It becomes us now to make a single observation upon the merits of the case, as presented by the record.

The agreement charged in the answer is unsupported by proof, whereas that alleged in the bill of complaint is substantiated by two witnesses, who made the distribution of the personal property, and their testimony is corroborated by pregnant circumstances. We therefore think there is error, not only in the general dismissal of the bill under

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the circumstances in which it was made, but that the Chancellor erred in refusing to direct the auditor to state an account, elucidating the matters in controversy between the parties, and thereby presenting the items of litigation more distinctly to the view of the court. The facts in this case render it indispensably necessary, that the order to the auditor should invest him with the usual authority of taking testimony upon the subjects matter of account, which are embraced in his statements.

DECREE REVERSED.

SIMMONS vs. DRURY.—*December, 1829.*

D, by last will, devised as follows: "Item. I give and bequeath to my two grandsons, S and W, sixty dollars each; and all the rest and residue of my personal estate, I give to be equally divided among my five sons." He also devised his real estate to his widow, and after her death, or marriage, directed his executors to sell it, and divide the proceeds among his sons. The testator's personal estate being insufficient to pay his debts, and also the pecuniary legacies, one of the grandsons, after the widow's death, filed a bill to have the land sold for the payment of his legacy. **HELD,** That he was not entitled to relief.

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainant (now appellant.) The bill which was filed on the 4th of February, 1825, stated, that *Charles Drury*, the grandfather of complainant, by his last will and testament, dated on the 8th of July, 1806, bequeathed to him the sum of \$60, after his debts and funeral charges should be paid. The testator then directed, that his land after the death or marriage of his wife, (to whom he gave an estate in the same during widowhood,) should be sold by his executors, *Henry Childs Drury* and *Charles Drury*, and the money, therefrom arising, to be divided between his five sons, of whom the said executors

are two. That one of the testator's sons has since died, as has also his widow. That the personal estate, except a very small balance, has been exhausted in the payment of debts, so that complainant has only received \$10, on account of his legacy, that being his proportion of the residuum in the hands of the executors. That *Henry C. Drury*, one of the executors and heirs of the said testator, has purchased the title of the other heirs to the land, and refuses to sell the same for the satisfaction of the balance of complainant's legacy. *Prayer*, that a decree may be had for the sale of said land, for the purpose of paying said legacy, and for general relief.

Charles Drury's will, referred to in the bill, contains, among others, the following clauses. "Item. I give and bequeath to my two grandsons, *William T. Simmons* and *Aaron Welch*, sixty dollars each." "And all the rest and residue of my personal estate, I give to be equally divided between my said five sons."

The answer of *Henry C. Drury*, *Charles Drury*, and *Samuel Drury*, three of the defendants, admitted the will of *Charles Drury*, the testator, and that he made such a disposition of his land, and bequeathed the legacy to the complainant as his bill charges. The defendants, *Charles* and *Samuel*, admit that they sold their interest in the land to the defendant, *Henry C.*, who alleges that he purchased the interest of the defendant, *Joseph Drury*. The defendant, *Henry C.*, states, that he paid the complainant his full proportion of the personal assets of the testator, on account of his legacy, as will appear by his receipt, filed with his answer. The defendants then deny, that the land devised to them by their father, is liable for the balance of complainant's legacy, as it is not, by the testator, made a charge thereon.

The answer of *Joseph Drury*, admits the facts set forth in the bill, and consents to the decree as prayed.

The complainant's receipt on account of his legacy, referred to in the answer of *Henry C. Drury*, was admitted to have been signed by the complainant.

A commission issued, to take testimony, but the proof taken does not appear to be material.

BLAND, Chancellor, (July Term, 1827.)

This case standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered.

It was urged, that the *Stat. of 5 Geo. 2, chap. 7*, by which, lands in this State were subjected to the payment of debts, must be allowed to have a direct and strong influence upon cases of this description. But whatever may be its effects under certain circumstances, I do not think that it can have any material bearing upon this particular case, and therefore, shall express no opinion respecting it, in any way whatever.

All the cases that have been cited as analogous to this, show, that the court has been altogether, or mainly governed, by what was deemed to be the intention of the testator. The whole controversy, here turns upon the single point of the intention of this testator, *Charles Drury*. He sets out with the general declaration, "after my debts and funeral charges are paid," but he does not say how, when, or out of what fund, they are to be paid; nor does he make any allusion to them. Hence this expression can be considered in no other light, than as a general recognition of the legal liability of the whole of his estate, to the payment of his debts and funeral charges. It manifests no intention to alter or change the general bearing of that liability in any manner whatever.

It is a very ancient and well established principle of our law, that the personal estate of a deceased debtor, shall be considered as the natural fund, for the payment of his debts, and must be first applied for that purpose. There are many cases, however, in which a Court of Equity will so marshal

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the assets in favor of creditors and legatees, as to relieve the personal estate from the grasps of those who have other means of obtaining satisfaction. But those cases only shew and illustrate the nature of the power of the court, under these circumstances, where the law, or the intention of the testator allows of the exercise of such a power. Here the intention of the testator, *Charles Drury*, is clear and decisive against the application of any such authority.

It is evident that he had under his contemplation the whole of his estate, made up as it was of the two well known kinds of property, *real* and *personal*, the legal character of each component part of which he perfectly understood, or shewed no disposition to alter in any one particular, in reference to the objects of his bounty. He first distinctly and specifically disposes of his whole real estate to his wife, for life, or during her widowhood, and after to his sons. He then proceeds to his personalty: He gives several pecuniary legacies, and then, by a sweeping bequest, disposes of "all the rest and residue of his *personal estate*." Taking the whole will together, it amounts to this. That after the estate has been cleared of all claims against it, in the usual manner, and according to law, the realty shall go to his wife and sons, and the personalty, if sufficient, shall be applied to the payment of certain legacies, and the residue, if any, to his sons. The devise of the land is as much and properly a *specific* donation, as the bequest of the pecuniary legacies. To charge the pecuniary legacies upon the land directly or indirectly, or by substitution, or otherwise, it is conceived would be a manifest violation of the intention of the testator, and unwarranted by any law, or adjudged case.

DECREED, that the complainant's bill be dismissed, with costs.

From which decree the complainant appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and ARCHER, J.

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Boyle, for the appellant, said, the question is whether, as the personal estate is insufficient to pay debts and legacies, and the debts having been paid out of the personal estate, the real estate should not be sold to pay the balance of the legacy to the complainant. He cited in his argument, *Bac. Ab. tit. Ex'or.*, (L. 2) *Ford vs. Grey*, 1 *Cas. in Chan.* 297. 2 *Chan. Rep.* 155. *Kaims Pr. Eq. B.* 1, Sec. 1, 16. 2 *Cas. in Chan.* 4. *Ib.* 115. *Ib.* 117. *Chepping vs. Chepping*, 1 *P. Wms.* 730. *Burton vs. Pierpont*, 2 *P. Wms.* 81. *Wainwright vs. Waterman*, 1 *Ves.* 312. *The acts of 1785*, ch. 80, and 1798, ch. 101, sub. ch. 8, sec. 17. *Tyson vs. Hollingsworth*, 1 *Harr. and Johns.* 470. *Stat.* 5, *Geo.* 2, ch. 7, sec. 4. *Killy's Rep. of the Statutes*, 249.

Brewer, Jr. for the appellees, referred to 4 *Bac. Ab.* 282, 286.

DECREE AFFIRMED.

ALDRIDGE AND HIGDON vs. WEEMS AND HALL.—December, 1829.

T, who was indebted to A and H, held a mortgage from W, upon which he made the following assignment, under his hand and seal. "For value received, I hereby transfer, assign and make over to Messrs. A and H, this mortgage and the debt so intended to be secured thereby, witness my hand and seal, this, &c." About twelve months after, T died. The mortgage and assignment were found uncanceled among his papers. To a bill filed by A and H, against the mortgagor and T's administrator, to enforce the assignment for the payment of their debt, which alleged, that T had promised to secure their debt by making the assignment in question, the answer of the administrator stated, "that T might have promised to secure the debt, and that the endorsement may have been written on the mortgage with a view to comply with such promise, but denied that there was a delivery of it in fact by T, or an acceptance thereof by the complainants." Upon appeal, it was HELD, that an assignment of T's interest in the mortgage, might be good and operative, without actual delivery, if

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connected with evidence to show he intended it to transfer his interest, in the thing assigned. That this assignment had all the forms and solemnities necessary to constitute a good contract, was in his hand-writing, signed by him, and contained a full expression of his intention to transfer his interest in the mortgage.

A Court of Equity has the power, and will make every possible effort, within the range allowed by the statute of frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law.

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainants, (now appellants.) The bill filed on the 5th of September, 1826, stated, that the complainants for a number of years were engaged as copartners in trade, in the City of *Baltimore*; that while so engaged in business, *Thomas Tongue* and *Thomas T. McPherson*, of *Anne Arundel County*, also engaged in trade under the firm of *Tongue and McPherson*, became indebted to them in the sum of \$5009 95, with interest; that much of this claim had existed for several years, and *Tongue*, who in the dealings between the two firms, was principally known and relied on by the complainants, had repeatedly promised to secure the payment of the said claim with interest. That *William Weems*, (one of the defendants and appellees) being indebted to *Tongue*, in the sum of \$2900, in order to secure the payment thereof, did, on the 14th of December, 1821, execute to the said *Tongue* a deed of mortgage, thereby conveying to him and his heirs, a tract or parcel of land called *Portland Manor*, lying in *Anne Arundel county*, and containing 300 acres, with a proviso, that if *Weems*, his heirs, &c. should pay to *Tongue*, his executors, &c. the said sum of \$2900, with interest thereon, in four years from the date thereof, then the said deed to be void. That the said deed was in due form of law acknowledged and recorded; that the said debt remains due, and the time limited for payment thereof expired in the month of December, 1825; and the debt intended to be secured by the said deed, being unsatisfied, a decree for the sale of the premises may now be asked. That at the execution of the said deed, and before the

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expiration of the time allowed to *Weems* for the payment of the said debt, *Tongue* proposed to the complainants to take, and they at his request agreed to take an assignment of the said mortgage, as a security to them, for the payment of so much of the debt due from *Tongue* and *McPherson* to the complainants, as by the said deed, *Weems* acknowledged that he owed to *Tongue*. The proposition of *Tongue* being acceded to by the complainants, and the form of the assignment which they were willing to take, being furnished to *Tongue* by the complainants, *Tongue*, in pursuance of the agreement aforesaid, on the back of the said deed of mortgage, wrote the following assignment: "For value received, I hereby transfer, assign and make over to Messrs. *Aldridge and Higdon of Baltimore*, this mortgage, and the debt so intended to be secured thereby. Witness my hand and seal, this 11th day of January, 1825." And the said assignment, in the hand-writing of *Tongue*, was by him, on the day expressed therein, signed, sealed and delivered to the complainants. The same however was an insufficient security for the debt of the complainants, and the time allowed in the deed to *Weems* to pay his debt, not having expired, the complainants, at the request of *Tongue*, agreed to leave the same in his possession, and the same was kept by him, the complainants having no occasion for it, until the death of *Tongue*, which happened a very short time afterwards. That the assignment was intended to operate, not as an absolute transfer to the complainants of the debt due from *Weems* to *Tongue*, but only as a security in part for the payment of a larger debt, due to them from *Tongue*, though they are willing to accept of the same, when the precise sum due on the mortgage is ascertained, as a transfer of the debt, and a payment of so much of their claim. But the complainants are advised and expressly charge, that the effect of such assignment is, to give to them a right to demand the said debt of *Weems*, to take legal steps for the recovery of it, and in a Court of Equity, they are the persons to ask, that in default of payment, a decree be

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passed for a sale of the mortgaged premises. They also charge, that the debt due to them from *Tongue* and *McPherson* is unpaid, and they have received no other security for the payment of it. That *Weems* has had notice of the said assignment; and although repeatedly requested, has refused to pay the debt due from him as aforesaid, or any part, but the same is still due. They further charge, that shortly after the execution of the assignment, *Tongue* died intestate; that letters of administration upon his estate have been granted to *Thomas J. Hall*, (the other defendant and appellee,) who having possessed himself of the effects and papers of his intestate, now holds the said mortgage and assignment; and the complainants pray, that he may be compelled to bring the same into court, in order that the right of the complainants thereto, may be shown, and a decree for the sale of the premises may be had. *Prayer*, that a decree may be had for the sale of the mortgaged premises for the benefit of the complainants, unless *Weems* shall, within a time therein to be limited, pay to them the debt due by him; and also for general relief.

The answer of *Hall*, admitted the partnership of the complainants, and that of *Tongue* and *McPherson*; also, that *Weems* was indebted to *Tongue*, and executed the mortgage mentioned, which he exhibited; also, that the endorsement on the mortgage, was in the hand-writing of *Tongue*; but he denied that the mortgage was ever delivered, either actually or virtually to the complainants by *Tongue*; and he stated, that the mortgage was found among *Tongue's* papers, after his death, not connected with any other paper or memorandum, to show that it had been left with him by the complainants. He admitted that *Tongue* might have promised to secure the debt due by *Tongue* and *McPherson* to the complainants, and that the endorsement may have been written on the mortgage by *Tongue*, with a view of complying with such promise; but he denied that there ever was a delivery in fact of the mortgage, by *Tongue*, or an acceptance thereof by the complainants. That *Tongue*

died in January, 1826, nearly a year after the date of the endorsement on the mortgage. That soon after the death of *Tongue*, and granting letters of administration to this defendant, he addressed a letter to the complainants, upon the subject of *Tongue's* affairs, in the expectation of receiving some important information from them. In their answer, there was no allusion to the assignment of the mortgage, and no claim or pretence set up to any part of *Tongue's* property, or to any of his securities, as having been appropriated to the benefit of, or assigned to the complainants. They did not then pretend to claim the mortgage upon *Weems*, as having been assigned to them. He believed, that the first information which they received of the endorsement on the mortgage, was communicated by him, no demand having been made by them for the surrender or delivery thereof, until after they had been informed by this defendant, of the existence of such endorsement. He knows nothing of, and therefore does not admit the statement in the bill of the form of an assignment, having been furnished by the complainants to *Tongue*. That the personal estate of *Tongue*, will not be sufficient to discharge his debts, and that he is advised not to surrender the said mortgage, unless he is compelled by law so to do, &c.

The answer of *Weems* admitted the execution of the mortgage, and the justice of the claim for which it was given. He knew nothing of the other facts stated in the bill. He claimed to be credited with the sum of \$439 26, being for tobacco delivered to *Tongue*, in part payment of the mortgage.

Admissions. It was admitted by the parties, that the letter from the defendant *Hall* to the complainants, and that from the complainants to *Hall*, marked exhibits A and B, were written by the parties signing them, and are the letters spoken of in the answer of *Hall*. Also, at the time of *Tongue's* death, and at the date of the endorsement on the mortgage, the partnership of *Tongue* and *McPherson*

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were largely indebted to the complainants, and that *Tongue*, the mortgagee, was one of that firm. Also, that the endorsement on the said mortgage, and the signature thereto, are in the hand-writing of *Tongue*.

Exhibit A. Letter from *Hall* to the complainants, dated *T. Landing*, the 10th of February, 1826. "Knowing the intimacy which existed between the late *Thomas Tongue* and yourselves, and the mutual friendship between you, I have taken the liberty of calling on you, for any information you may be in possession of, relative to his business with the Messrs. *Mullikins*; also any information you possess, relative to the amount of debts due from him individually in *Baltimore*. There are rumors here, that are really alarming to those interested in his estate, respecting money due in *Baltimore*. Be good enough to give me your ideas generally, as regards the *Mullikins*, and what would be the most judicious course to pursue in recovering the money, also the amount they owe him, for it is impossible to ascertain it from his papers. This is a confidential communication, and your reply shall be so considered."

Exhibit B. Letter from the complainants to *Hall*, dated *Baltimore*, the 11th of February, 1826. "In reply to your letter of the 10th inst. we would merely remark, that we are confident that the claims in this place against *T. Tongue*, individually, cannot be large; but as we are not at present enabled to state, with any degree of certainty, the amount due by him, we would recommend your taking a trip to this place, when you can, on the spot, get more satisfactory information. We think it also necessary, that you should see Mr. *R. Mullikin*, he resides here, relative to the claim against *B. D.* and *R. Mullikin*; and we shall take great pleasure in giving you all the information, as well as advice, relative thereto. We can now say, that we saw notes in possession of Mr. *Tongue*, for \$3500, each drawn by *B. D.* and *R. Mullikin*; but which Mr. *T.* said was about \$3000 short of what they owed him. You must come up."

BLAND, Chancellor, (December Term, 1826.)

The only question in this case is, whether the writing of the 11th of January, 1825, endorsed on the mortgage, is available to the plaintiffs or not? There can be no doubt, that delivery is essential to the validity of a deed; nor can it be doubted, that this court has the power, and will make every possible effort, within the range allowed by the statute of frauds, to heal the infirmities of *defective* contracts of every description, that can be sanctioned by the law. But the objection to the plaintiffs taking any thing by this writing is, not that it wants any of the forms and solemnities peculiar to any class of contracts, or that it is an imperfect expression of the will and agreement of the party. It is, that it has not, nor never had, as a contract, that which is of the vital essence of all obligations, the *free and final assent* of the party; and, consequently, that it is not a contract at all, or in any sense.

The *assent* of the parties is indispensably necessary to the formation of all contracts. The various forms and ceremonies prescribed, or required by the law, are the solemn precautions, the evidences, by which the free and deliberate *assent* of the mind of the person contracting, are required to be externally manifested; and, when the *consent* of the party is clearly established, equity will go far in supplying the want of them.

The doctrine, in relation to equitable mortgages, has no direct bearing upon this question. But, most of the cases that have been referred to in the argument, are those which involve the question of an equitable mortgage or not; and, indeed all others, which arise out of informal, defective, mistaken, or part executed contracts, turn upon the establishment of this preliminary point, the *final and deliberate assent* of the party, who is alleged to have contracted. For, a complainant cannot ask a remedy for any omitted form or solemnity; nor can the court be called on to supply a defective expression of will; to correct an error; or to complete the execution of an unfinished intention, where there is no

satisfactory proof of any deliberate and final *intention* to contract, ever having existed.

That the late *Thomas Tongue* contemplated an assignment of the mortgage; that he meditated upon it; and that he expressed his thoughts upon the subject in writing, there can be no doubt. But, there is not the least evidence, that he had ever, at any time during his life, given his *final consent* to such a contract as that, upon which it appears, he had seriously reflected, and thus expressed his thoughts. He contemplated making an acknowledgment, that he had received value for the mortgage; and, he expressed the result of his meditation upon the subject of making an assignment of it, to the plaintiffs, in consideration thereof; but there is no proof that he ever did so, in fact. He never informed the plaintiffs, or any one else, that he had done so; nor were they ever in any way apprised, that he had made and *assented* to a *contract*, by which he assigned the mortgage to them. This writing remained in *Tongue's* own possession, under his own entire and absolute control, until his death; and, being so left, without that *assent*, essentially necessary to the creation of an obligation, it cannot now be considered as a contract or agreement, of any description whatever. Nor, can it be allowed to take effect, in any way, as a testamentary writing; because there is nothing upon the face of it; nor any act, or evidence in relation to it, which shows, that it was made in contemplation of the death of the writer; or, was ever intended by him, to take effect after his decease. This writing is, therefore, in every point of view, a mere nullity. DECREED, that the bill of complaint of the complainants, be dismissed with costs.

From which decree the complainants appealed to this court.

The cause was argued before EARLE, MARTIN, and DORSEY, J.

Magruder, for the appellants, contended,

1. That they were entitled to the same relief against *Hall*, the administrator of *Tongue*, that they could have had against *Tongue*, had he been alive. *Dorsey vs. Smithson*, 6 *Harr. and Johns*. 61.

2. That the assignment of the mortgage being proved to be in the hand-writing of the mortgagee, entitled the appellants, as assignees, to the debt thereby secured, and to the security for the payment of it; of course the relief prayed ought to have been granted.

It was not necessary to prove an actual delivery of the assignment, if a delivery was necessary to such an assignment. The law does not authorise the assignment of a *chose in action*. Legal evidence of the fact of an agreement to assign, is sufficient, if in writing. Suppose *Tongue* had filed a bill to foreclose the mortgage, *Weems* could have objected that he was not the proper person to file the bill, having assigned away his interest. Suppose *Weems* had paid the mortgaged debt to the assignees, *Tongue* could not recover it. If a deed of bargain and sale is not recorded, yet it is evidence of a contract; and the deed is not void, because it was not recorded. Debts may be assigned by parol, upon valuable consideration. 2 *Com. Dig.* 373, cites 2 *Ch. Cas.* 7, 37. This is not an instrument within the statute of frauds; and could be the foundation for a suit in equity. *Clavering vs. Clavering*, 2 *Vern.* 473. *Boughton vs. Boughton*, 1 *Atk.* 625. *Johnson vs. Smith*, 1 *Ves.* 314. *Souveryby vs. Arden*, 1 *Johns. Ch. Rep.* 240, 256. 1 *Madd. Ch.* 299. *Pow. on Mort.* 460. *Ham. Dig.* 365, pl. 21. *Ex parte Bruce*, 1 *Rose*, 374. *Hankey vs. Vernon*, 2 *Cox's Ch. Rep.* 13. *Burn vs. Burn*, 3 *Ves.* 573, 582, 583. *Mestaer vs. Gillespie*, 11 *Ves.* 624. If it is not an assignment, it operates as a release of the mortgage, the debt being satisfied. Is it necessary to prove the delivery of a receipt, in order to make it effectual? *Saunderson vs. Jackson*, 2 *Bos. and Pull.* 239.

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S. Pinkney, for the appellees. The delivery of an instrument of writing is essential. *Clarke vs. Ray*, 1 Harr. and Johns. 323. Delivery is necessary, because the party may retract, and so long as it remained undelivered, it was for his consideration. Suppose a promissory note was found in the possession of the drawer, would it not be considered as a satisfaction of the amount? The complainants do not appear to be the creditors of *Tongue*. Their claim was against *Tongue* and *McPherson*, and *McPherson* having survived *Tongue*, their remedy was against *McPherson*. *McCulloh vs. Dashiell*, 1 Harr. and Gill, 96. There are instances where evidence of presumption that there was a delivery, would be sufficient, if not rebutted. *Goodrich vs. Walker*, 1 Johns. Cas. 250. *Clavering vs. Clavering*, 2 Vern. 473. *Souwerbye vs. Arden*, 1 Johns. Ch. Rep. 240.

Shaw, also for the appellees. 1. If *Tongue* had been a party, the case would be different; but it is the case of one creditor claiming to have a preference to the exclusion of all other creditors. There was no delivery of the assignment, either actual or constructive. 2 *Jacobs' L. D.* 223.

2. The circumstances connected with the assignment, show it was not considered to be effectual. It remained in the possession of *Tongue* a whole year, and there is no proof that he had apprized the complainants he had executed the assignment. If it is a valid assignment, it must be inferred that *Tongue* intended to secure his own individual debt, and not that of *Tongue* and *McPherson*.

3. It was not such a deposite of title papers, as to give the complainants an equitable lien. There could be no deposite, without a depositee; here there was none. *Mandeville vs. Welsh*, 5 Wheat. 284. *Ex parte Mountfort*, 14 Ves. 606. *Ex parte Coombe*, 17 Ves. 369. *Ex parte Bulteel*, 2 Cox's Ch. Cas. 247.

Magruder, in reply. This case is to be decided on under the agreement of admissions between the parties, with-

out resorting to the bill or answers as to the facts relative to the assignment. There is no evidence in the record about creditors, or partnership creditors. The creditors are not before the court. The cases cited on the other side, were cases of bankruptcy, where the creditors were seeking to recover. If there was a consideration given for the assignment, Chancery can enforce it. *Black vs. Cord*, 2 *Harr. and Gill*, 100. *Lord Carteret vs. Paschal*, 3 *P. Wms.* 199. *Bunn vs. Winthrop*, 1 *Johns. Ch. Rep.* 336. *Tongue* held the assignment in trust for the benefit of the complainants. *Moses vs. Murgatroyd*, 1 *Johns. Ch. Rep.* 119. *Cumberland vs. Codrington*, 3 *Johns. Ch. Rep.* 261. *Shepherd vs. McEvers*, 4 *Johns. Ch. Rep.* 136. A *chose in action* may be assigned, and a court of equity will protect the assignee. The assignment need not be in writing; and if it is in writing it need not be under seal. If the assignor disputes it, then the assignee must prove a valuable consideration for it.

MARTIN, J. delivered the opinion of the court.

The bill charges that *Tongue* and *McPherson* were indebted to *Aldridge and Higdon*, in a large sum of money, and that *Tongue*, who was the active partner, had repeatedly promised to secure the payment of the same. That *Weems* was indebted to *Tongue*, and gave him a deed of mortgage on the 14th day of December, 1821, to secure the payment of the debt in four years after the date of the mortgage. That before the expiration of the time allowed *Weems* for payment, *Tongue* proposed, and the complainants agreed, to accept an assignment of this mortgage, as security to them in part payment of their debt, and accordingly the following assignment was made by *Tongue* on the mortgage: "For value received, I hereby transfer, assign, and make over to Messrs. *Aldridge and Higdon*, of Baltimore, this mortgage, and the debt so intended to be secured thereby: witness my hand and seal, this eleventh day of January, eighteen hundred and twenty-five." That *Tongue*,

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in a short time after this assignment, died intestate, and letters of administration were granted to *Hall*, &c. The answer of *Hall* admits the partnership of *Tongue* and *McPherson*; that the mortgage, as set out in the bill, was executed by *Weems*, and that the endorsement on the mortgage, purporting to be an assignment, *is in the hand-writing of Tongue*. That the mortgage was found among *Tongue's* papers at his death. He further admits that *Tongue* might have promised to secure the debt due to the complainants, and that the endorsement may have been written on said mortgage, with a view of complying with such promise, but he denies that there ever was a delivery in fact of the said mortgage by *Tongue*, or an acceptance thereof by the said complainants. It is also stated in the answer, that *Tongue* died in January, 1826. The only question put in issue by this bill and answer, is, whether it was necessary to give legal effect to this assignment, that there should be a delivery of the mortgage by *Tongue* to the complainants.

In examining this case, it is necessary to keep constantly in view, that this is not a mortgage or deed that requires delivery to give it legal effect, but an assignment of *Tongue's* interest in the mortgage, that may be good and operative without actual delivery, if there is evidence to shew the party intended it, to transfer his interest in the thing assigned. This doctrine is admitted by the Chancellor in his decree, and that a Court of Equity has the power, and will make *every possible effort*, within the range allowed by the *statute of frauds*, to heal the infirmities of defective contracts of every description, that can be sanctioned by the law. This assignment has all the forms and solemnities necessary to constitute a good contract. It is in the hand-writing of *Tongue*, and signed by him, and is a full expression of his intention to transfer his interest in the mortgage, to *Aldridge and Higdon*. This not only appears on the face of the assignment itself, but is admitted by the answer of *Hall*, the administrator of *Tongue*.

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In his answer, responsive to the bill, he admits the assignment is in the hand-writing of *Tongue*, and was found among his papers at his death. That the said *Tongue* might have promised to secure the debt due to *Aldridge and Higdon*, and that the endorsement may have been written on the said mortgage by the said *Tongue*, with a view of complying with such promise.

It was the moral duty of *Tongue* to secure the debt due to *Aldridge and Higdon*. It was his express agreement to do so. He has made a solemn instrument in his own hand-writing, and signed by him to produce that effect, and this instrument remains in his possession, *uncancelled*, until the day of his death; yet it is said you are to presume this was all idle and nugatory, and that too, in a Court of Equity, whose peculiar province and pleasure it is to heal defective contracts, and carry the intention of parties into effect. This doctrine would pervert the equitable powers of a Court of Chancery.

The object and intention of *Tongue*, when he made the assignment, is not only obvious from the writing itself, but is admitted by the administrator, and his permitting it to remain *uncancelled*, affords a strong presumption that the same intention continued to the day of his death. This record presents no sufficient evidence to rebut that presumption. We are therefore of opinion that the decree of the Chancellor is erroneous, and ought to be reversed.

DECREE REVERSED.

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JOHN S. STILES vs. JAMES H. CAUSTEN.—December,
1829.

Several persons who had claims on the government of the United States, for injury done to their property, taken and used to prevent the approach of an enemy, employed an agent to collect their evidence, and prosecute their demands; but, before the matter was finally adjusted, one of them died. After this, the representative of the deceased, the defendant, attended several meetings of the persons interested in the said claims, at which it was always stated, that the plaintiff was acting as the agent of the owners of the property taken in prosecuting their claim. The defendant also gave the plaintiff a letter of introduction, in which he was mentioned as the "representative of the unfortunate owners" of the property, for which indemnity was sought; and the person to whom it was addressed, was requested to aid the plaintiff in obtaining redress. One of the witnesses also proved, that in frequent conversations with the defendant, he, the witness, had stated that twenty per cent. was the commission stipulated to be paid by the owners of the aforesaid property; and that the defendant never objected to the same. The plaintiff attended to the agency until the passage of a law, under which the defendant was paid, as executor. In an action by the agent for the recovery of compensation for his services, HELD, that it was properly left to the jury to determine whether there was any *new* contract between the plaintiff and defendant, after the death of the original owner, by which the defendant would be liable in his individual capacity.

APPEAL from *Baltimore County Court*.

This was an action of *assumpsit*, instituted on the 21st of April, in the year 1824, by the appellee, (the plaintiff in the court below,) against the appellant, (the defendant in that court.)

The declaration contained counts, for work and labor, and materials found; for use and occupation; for matters properly chargeable in account; for goods, wares, and merchandise; for money lent, and advanced, money had and received; and on an *insimul computassent*.

The defendant pleaded, 1st. *Non assumpsit*. 2nd, *Non assumpsit infra tres annos*; and 3d, *actio non accrevit*.

Issue to the 1st plea, and general replications, and issues to the 2d and 3d pleas.

At the trial, the plaintiff gave in evidence, that *George*

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Stiles, in his life-time, being the owner of three vessels that were sunk at the entrance of the harbor of *Baltimore*, in order to obstruct the approach of the ships of the enemy to the city of *Baltimore*, during the late war between *Great Britain* and the *United States*, did sometime in the year 1816 or 17, and during the life of said *Stiles*, unite with several other owners whose vessels had likewise been sunk, in a petition to Congress for compensation of the loss occasioned thereby; and that the said *Stiles*, in conjunction with the said owners, appointed the plaintiff in this cause, to obtain and collect documents and evidence in support of the claims of the said petitioners, and to prosecute the said petition before Congress, by proceeding to the city of *Washington*, with the necessary documents and proofs to establish the justice of said claim for compensation, and that the said plaintiff should be entitled to receive, as a reward for his services aforesaid, at the rate of twenty per cent. on the amount recovered. The plaintiff further offered evidence, that the said *George Stiles* died in the year 1819, and before any decision had been made by Congress on the subject of said petition; that sometime subsequent to the death of said *George Stiles*, and after the defendant had taken out letters testamentary on his estate, he, the defendant, attended several meetings of the aforesaid owners, on the subject of the aforesaid petition, in which it was always stated, that said *Causten* was acting as the agent of said owners in prosecuting the petition aforesaid. And further, that the defendant wrote the following letter, which he addressed to Commodore *Rodgers*, at the city of *Washington*: “*Baltimore*, 1st February, 1821. Commodore John Rodgers: My dear Sir,—Permit me the pleasure of introducing to your acquaintance, my friend, Mr. James Causten, who visits your city on the subject of the vessels so prudently and efficaciously sunk in this harbor on the ever memorable September, 1814. Mr. Causten goes as a representative of the unfortunate owners, who, you know, have ever since been refused a fair com-

compensation for the very heavy damages sustained, and must beg the favor of you to grant him such friendly advice and information as you may deem calculated to aid him in this very deteriorated business. Yours, with great respect, and pure regard, *John S. Stiles.*” The plaintiff also offered evidence by *Robert Barry*, that he had had frequent conversations with the defendant, in which he stated that twenty per cent. was the commission stipulated to be paid by said owners, and that the defendant never objected to the same. He also offered in evidence the act of Congress, making the compensation. And that the amount of loss ascertained, according to the provisions of said act, to have been sustained by the destruction of said vessels, owned as aforesaid by said *George Stiles*, being between five and six thousand dollars, was duly paid to the defendant, as executor of said *George Stiles*, by the agents of the government, and that he has never accounted to the plaintiff for any part of the money so received, but has retained the whole amount. And the plaintiff, further to support the issue on his part, gave evidence to the jury, by legal and competent testimony, that he did collect the documents and proofs in the city of *Baltimore*, and elsewhere, which were necessary to support the claims of the petitioners, including those of the said *George Stiles*, and that he did, previous to the death of the said *George Stiles* in 1819, after said contract, proceed to *Washington*, and that since the death of the said *Stiles*, and since letters have been granted to the defendant, did as well collect other documents and evidence in support of said claim, as attend at *Washington* during several sessions of Congress, prosecuting the claims of the petitioners and of the defendant, until the passage of the law of Congress aforesaid, by which the claims of the petitioners were liquidated. Whereupon, the defendant prayed the Court to instruct the jury, that, 1st. If the jury shall believe, from the evidence in the cause, that *George Stiles*, in his life-time, contracted with the plaintiff for his services as an agent in prosecuting claims for compensation alleged

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to be due, for the destruction of certain vessels owned by the testator in his life-time, and for which he was to receive at the rate of 20 per centum, and that he continued to act in virtue of *that agency*, after the death of said *George Stiles*, in pursuance of said contract, then the plaintiff is not entitled to recover in this action; which opinion the court (ARCHER, Ch. J.) gave. Thereupon the defendant further prayed the opinion of the Court, and their direction to the jury, that there is not sufficient evidence in the cause, to shew that any *new* contract was made between the plaintiff and the defendant, after the death of *George Stiles*, by which the plaintiff is entitled to recover in this cause from the defendant, in his individual capacity. And the defendant further prayed the opinion of the Court, that if the jury believe that the claim set up in this case was on a contract for procuring a law of Congress, then the same is against public policy and void; both of which opinions the Court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Meredith, for the appellant, abandoned the last prayer. On the 2nd prayer in the exception, he contended, that *Baltimore County Court* erred in refusing to instruct the jury, that there was not sufficient evidence to shew that any contract was made between the plaintiff and defendant, after the death of *George Stiles*, by which the plaintiff was entitled to recover of the defendant in his individual capacity. He referred to *Davis vs. Davis*, 7 *Harr. and Johns.* 36. *Morris vs. Brickley and Caldwell*, 1 *Harr. and Gill*, 107.

R. Johnson, and *Evans* for the appellee, cited *Davis vs. Davis*, 7 *Harr. and Johns.* 39. *Morris vs. Brickley and*

Caldwell, 1 *Harr. and Gill*, 109. *McElderry vs. Flanagan*, *Id.* 321. 2 *Stark. Evid.* 83. 4 *Maule and Selw.* 277. *Howard vs. Baillie*, 2 *H. Blk.* 622. 2 *Stark. Evid.* 117. 1 *Chitty Plead.* 337. *Webber vs. Tivill*, 2 *Saund.* 122, (note 2.) *Bank of Washington vs. Triplett and Neale*, 1 *Peters' Rep.* 25.

DORSEY, J. delivered the opinion of the court.

The only question for our consideration is, was there any evidence to be left to a jury, of a contract between *John S. Stiles*, the executor of *George Stiles*, and *Causten*, the appellee, by which the latter was employed by the former as agent for the prosecution of the claim, which might be made on the *United States*, for the injury done to the vessels of the testator, sunk during the late war, for the preservation of the city of *Baltimore*. We concur with the opinion of the County Court, that there was. Putting out of view the fact, that such a contract was entered into between the testator in his life-time and *Causten*, and it is unquestionable, from the proof in the cause, that a jury might, nay, ought, to infer the existence of an agreement of this kind, between the appellant and the appellee. Upon no other principle can a solution be given to the acts of *John S. Stiles*. The right of the jury to draw this inference, is not taken away by proof of a contract between the testator and *Causten*, of which there is no legal proof that *John S. Stiles* had any knowledge. The fact of such knowledge, is a matter for the jury to decide upon, after deliberating on all the circumstances in testimony before them. The inference of its existence is not self-evident, or so undeniably true, that the human mind could not doubt on the subject. The County Court were right, therefore, in submitting it to the consideration of the jury. We mean to decide simply the question before us; and to intimate no opinion, as to the appellee's right to recover on the count for money had and received, in case all his

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services as agent, had been rendered under his contract with *George Stiles*, the testator.

JUDGMENT AFFIRMED.

ROGERS' LESSEE vs. RABORG and REDDING.—*December,*
1829.

It is a settled rule of evidence, that if a person who has been regularly sworn and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken, and returned with the plots, may be read in evidence at the trial from necessity.

So the deposition of a witness sworn and examined under the same circumstances, and who had become paralytic since his examination, and though regularly summoned, was unable to leave his house, or to speak so as to be understood, may also be read in evidence at the trial, for the same reason.

Locations made by a lessor of the plaintiff in an action of ejectment, as, and for his claim and pretensions to a tract of land, being transferred to the plots in another action of ejectment, brought against those claiming under the lessor in the first action, and who took defence for the same tract in the second action, are competent, though not conclusive evidence for the plaintiff in the second action, to shew the true location of such tract, although the first action was dismissed.

Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances expressed, are to be disregarded, and the lines run to the boundaries, according to the calls.

The patent for a tract of land described it as follows: "lying in the county aforesaid, on the head of the N. W. branch of P. river, and joining the S. W. side of B town, and on a tract of land called L, beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of B town, and running thence, &c." the different lines by course and distance, without calls. HELD, that upon the true construction of this patent, neither the first, nor any other line of the tract granted by it, has a call to the first, or any other line of the tract called L, and that the word "*joining*," as there used, is not of such imperative and binding force, as that the said tract must be so located as to join L, but that the beginning tree being ascertained, the location of the land from that tree, must be governed by the particular description given in this case, by courses and distances, they having no calls or binding expressions to control them.

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APPEAL from *Baltimore County Court*.

Ejectment for a tract of land called "*Widow's Assistance*." The declaration contained a count on the demise of *Philip Rogers*, the lessor of the plaintiff, on the 1st of February, 1822, for fifteen years. The defendant, the appellee, appeared, entered into the common rule, took defence on warrant, and pleaded not guilty, to which issue was joined. A warrant of resurvey issued, and plots were returned. The defendant took defence for a tract of land called, "*Deep Point*."

1. At the trial, the plaintiff read in evidence to the jury, the patent for the tract of land called "*Widow's Assistance*," granted to *Henrietta Rogers*, on the 13th of January, 1767, and proved, that *Henrietta Rogers*, the patentee, died in the year 1790, when said land descended to the lessor of the plaintiff, as her heir at law. And also, that said land was held and claimed by them, and partly occupied by the tenants of the said *Philip*, until the year 1819, when the defendants extended their fence within said land, as denoted by three black dots, as shown on the plots in this cause. The plaintiff also gave evidence, that one *Jacob Brown*, had been sworn and examined, as a witness for him upon the survey made in the cause; that he had at that time shown to the sheriff and surveyor, the objects and matters, stated in the surveyor's explanations to have been shown by said *Brown*, and located on the plots in this cause, as so shown; and also gave evidence, that the deposition in writing of said *Brown*, was taken by the sheriff upon the said survey, which deposition was returned to the court by the sheriff, with the plots; and also, that said *Brown* had been regularly summoned to attend this court as a witness for the plaintiff in this cause. And further gave evidence, that since the taking of said deposition, the said *Jacob Brown* has become, and still is, afflicted with a paralytic disease, which renders him unable to leave his house, and unable to talk so as to be understood; and the plaintiff thereupon offered to read the deposition of said *Jacob Brown* in evidence, to which the defendants objected,

and the Court, (HANSON, A. J.) being of opinion that said deposition was inadmissible, refused to let it go to the jury. The plaintiff excepted.

2. The defendants then read in evidence to the jury, the patent of a tract of land called *Deep Point*, granted to *John Frazier*, on the 20th of February, 1749, which said patent contains the following expressions: "We do therefore hereby grant unto him, the said *John Frazier*, all that tract or parcel of land called *Deep Point*, lying in the county aforesaid, on the head of the north west branch of *Patapsco* river, and joining the south west side of *Baltimore* town, and on a tract of land called *Lunn's Lot*, beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of *Baltimore* town, and running thence, &c." And then made title to the said tract of land, by sundry mesne conveyances, through and under one *Alexander Frazier*. Whereupon the plaintiff offered to read in evidence, a duly attested copy of the record of proceedings in an action of ejectment, and of the plot and certificate of explanations therein, instituted by the said *Alexander* against *Cornelius Howard* and the said *Henrietta Rogers*, for the recovery of the same land called *Deep Point*, in the Provincial Court of *Maryland*, in the year 1772, in which the aforesaid tract of land is located, as the claim and pretension of the plaintiff in the action, for the purpose of showing by said plot and explanations, that said tract called *Deep Point*, was then surveyed and located by said *Frazier*, in that suit, in the same manner and position, as it is located on the plots in this cause; the plaintiff at the same time offering to prove by the surveyor, who made the plots in this cause, that the present location of the land, was transferred, and made from the locations of the same, as made on the plot in the proceedings so offered to be read in evidence; and further to show, the true original location of said tract of land. The defendants objected, and the court, (HANSON, A. J.) was of opinion, that the matters so offered in evidence, were inadmissible in law, for any of the pur-

poses stated; inasmuch as it appeared by the copy of the proceedings, that said *Frazier* had suffered a non-suit in said action, notwithstanding it appeared also, by said proceedings, that the judgment of non-suit therein, was rendered against said *Frazier*, for his default in not giving security for the costs, which the court had ruled him to give, and refused to permit the evidence to go to the jury. The plaintiff excepted.

3. The plaintiff, in addition to the evidence by him given and offered in the preceding bills of exceptions, gave in evidence, that a certain *Philip Hall*, in the year 1782 and 1783, being in possession of, and claiming title to said land, called *Deep Point*, executed leases for the several lots of the same land, fronting on the north side of *Pratt street*, which are located on the plots in this cause, to the persons whose names are written on the said lots, on which houses were erected by the lessees, as located on said plots; and that in the said leases, the said *Hall* calls and describes the lots to be, and to begin respectively at the number of feet therein expressed, East from where the first line of *Deep Point* intersects the North side of *Pratt street*, and that the said number of feet, in said leases severally expressed, as their several places of beginning, being reversely measured, extend from the said respective lots on the North side of *Pratt street*, and terminate at the red circle, on the plots aforesaid; and further proved, that *Alexander McKensie*, under whom the defendants claim, having become seized and possessed of said *Deep Point*, under the said *Alexander Frazier*, did, in the year 1818, sell and convey one of the aforesaid lots, which had been leased by said *Hall*, to *John Mickle*, and in the conveyance therefor, said *McKensie* describes the said lot to begin on *Pratt street*, at the distance of 52 feet East from the place where the first line of *Deep Point* intersects *Pratt street*; and also proved that 52 feet measured reversely from the beginning of said lot, would extend to the North side of *Pratt street*, and terminate at the said red circle; the purpose of which evidence was, to show,

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that the location of the said first line of *Deep Point*, as shown and claimed by said *Alexander Frazier* in the aforesaid action, at the time thereof, was, and is the same, as that which the plaintiff hath given said line in this cause; and to show that the position and location of the said first line at its intersection, or crossing the North side of *Pratt* street, as claimed and described by said *Hall*, in the leases aforesaid, and as claimed and described by said *McKensie*, in his conveyance aforesaid, was, and is the same, as that which the plaintiff has given said line in the location thereof in this cause; and also to show the true original location of said line and land. Whereupon the defendants produced and read in evidence to the jury, a patent for a tract of land called *Lunn's Lot*, granted to *Edward Lunn*, on the 20th of July, in the year 1673, and shewed the Court, from the plots in this cause, that the 16th line of *Lunn's Lot*, as located from red A on said plots in two ways, as shewn on said plots, and also, that *Deep Point* is located by them, as shewn on the plots, running its first line the entire length thereof, from red A, to red 126, with the said sixteenth line, according to the second location of that line, and that there is no other location of *Deep Point* on the plots, which runs the first line thereof, its entire length with the said sixteenth line. Thereupon the defendants prayed the opinion of the court, and their direction to the jury, that inasmuch as *Deep Point*, if run course and distance, will run into *Lunn's Lot*, as located by both plaintiff and defendant, and the grant of *Deep Point*, properly construed, calls to join on *Lunn's Lot*, that the first line of the tract called *Deep Point*, must run with an outline of *Lunn's Lot*, the extent of the distance of the first line of *Deep Point*; and the residue of the tract must be located, course and distance, with such an allowance for variation, as the jury might deem proper to make; and inasmuch as *Deep Point*, thus located, binding on *Lunn's Lot*, as located by either the plaintiff or defendant on the plots, covers the whole land in controversy in this cause,

that the plaintiff is not entitled to recover; to which construction of the patent of *Deep Point*, the plaintiff objected, and showed to the court, by the plots in this cause, that the defendants claim, for the tract called *Deep Point*: in their defence taken in this cause, a different position from that so taken. The court, (HANSON, A. J.) gave the following direction to the jury: the tract of land called *Deep Point*, must, in its first line, run joining on *Lunn's Lot*, the entire length of said line, and cannot run into it; and there being but two locations of *Deep Point* in this manner, by either of which, the claims and pretensions of the plaintiff, are covered by *Deep Point*, to which he sets up no title, the plaintiff is not entitled to recover.

The plaintiff excepted; and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

H. W. Rogers, for the appellant, contended,

1. That the deposition of *Jacob Brown*, who was regularly sworn on the survey, and who was proved to have been rendered incapable of attending the trial, by an attack of paralysis, was admissible evidence. *Howard vs. Moale, et al*, 2 *Harr. and Johns*. 372. *Bowie vs. O'Neal*, 5 *Harr. and Johns*. 226. *Stewart vs. Mason*, 3 *Harr. and Johns*. 507.

2. The record and plot in the ejectment brought in 1772, by *Alexander Frazier*, under whom the defendants claim, for the tract of land called *Deep Point*, against *C. Howard* and *H. Rogers*, the ancestor of the plaintiff, being offered to show the manner in which *Frazier* located *Deep Point* as his claim, at that time, was evidence by which the jury might be governed, in their finding in this case, and the County Court erred in rejecting it. *Jarret vs. West*, 1 *Harr. and Johns*. 503. *Mason vs. Stewart, et al*.

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3 *Harr. and Johns*. 507. *Ridgely vs. Ogle and Leonard*, 4 *Harr. and M'Hen*. 123.

3. The direction of the Court that the patent for *Deep Point*, calls imperatively to bind on the line of *Lunn's Lot*, the whole extent of the first line of *Deep Point*, was erroneous; the binding expressions relating only to the beginning of *Deep Point*, and cannot be gratified to the whole extent of its first line, as that is contradicted by the call itself, for the south west side of *Baltimore Town*.

Mayer, for the appellees.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This case is brought before us on three bills of exception taken at the trial; the first of which is to the refusal of the Court to permit a deposition, which was offered in evidence, to be read to the jury.

It is a settled rule of evidence in this State, that if a person who has been regularly sworn, and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown, and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken and returned with the plots, may be read in evidence at the trial from necessity, and being taken too by authority, and with the privilege and advantage of cross examination extended to the opposite party. Here the foundation laid for letting in the deposition of the witness, which appears to have been regularly taken on the survey, and returned with the plots, was, that he had since become paralytic, and though regularly summoned as a witness, was unable to leave his house, or to speak so as to be understood. He was not indeed dead, nor had he gone out of the State, beyond the reach of the process of *Baltimore County Court*, in which the action was depending; but he was dead to all the purposes of giving evidence in a court of justice, and the benefit of his oral tes-

timony at the bar, was as much lost to the party, as if he had, in fact, been dead, or had left the State.

The necessity, therefore, of resorting to his deposition, was the same as if he had been dead, and the reason being the same, we think it ought to have been admitted. And more strongly than if he had left the State; his inability to give evidence being produced by the act of *God*, leaving to the party requiring the benefit of it, no means of obtaining it, and without any negligence or fault on his part, which may not always be strictly the case, in relation to a witness who has left the State.

We differ, too, with the Court below, in the opinion presented by the second exception, and think that Court erred in not permitting the appellant to give in evidence to the jury, the locations made by *Alexander Frazier*, in an action of Ejectment brought by him against *Cornelius Howard* and *Henrietta Rogers*, for the tract of land called *Deep Point*, as, and for, his claim and pretensions.

Henrietta Rogers was the patentee of the tract called *Widow's Assistance*, for which this suit was brought, and *Philip Rogers*, the lessor of the plaintiff, (who is the appellant,) is her son and heir-at-law, and claims under her. *John Frazier*, under whom *Alexander Frazier* claimed, was the [patentee of *Deep Point*, and *Raborg and Redding*, the defendants, (who are the appellees,) claim under *Alexander Frazier*. The location of *Deep Point*, as made by *Alexander Frazier*, as and for his claim and pretension on the plats returned in the action, brought by him for that tract of land, against *Howard* and *Henrietta Rogers*, is transferred from those plots, to the plots returned in this cause. *Deep Point* being the elder tract, the right of the appellant to recover, depends, as that of *Alexander Frazier* did, in his action against *Howard* and *Henrietta Rogers*, upon the true location of that tract. And if that suit had proceeded to trial and verdict, and this was a case between *Henrietta Rogers* and *Alexander Frazier*, it cannot be doubted that the plots returned in that case,

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and the location thereon by *Frazier* of *Deep Point*, might be given in evidence against him; it is the every day practice. And as little can it be doubted that the same evidence might be given by the heir-at-law of *Henrietta Rogers*, against those claiming under *Alexander Frazier*. But it seems to have been thought inadmissible, because *Alexander Frazier* did not prosecute [his suit against *Howard* and *Henrietta Rogers* to a trial, but suffered a non-suit to be entered. The force of this objection we do not distinctly perceive; the evidence offered was not as a judgment on the merits against *Frazier*, but only to show his own views, in relation to the true location of the land he claimed. The declarations, or admissions of a party to a suit, may always be given in evidence against him; why then may not his more solemn acts, such as a deliberate location of a tract of land, claimed by him, upon plots returned in a suit brought for the recovery of it, showing his own opinion of its true location, with which he may be supposed to be acquainted? We do not say it would be conclusive evidence against him, or those claiming under him, in any subsequent suit involving the location of the same land; it certainly would not. But we think it clearly admissible, as a fact evincing his sense at the time, touching the proper location, as much so as any other act, declaration, or admission of his could be.

The question presented by the third exception, arises on the construction of the patent for the tract of land called *Deep Point*. The expressions in the patent, to which we are called upon to give a construction, are "lying in the county aforesaid, on the head of the north west branch of *Patapsco* river, and joining the south west side of *Baltimore* town, and on a tract of land called *Lunn's Lot*, beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of *Baltimore* town, and running thence, &c." the different lines, courses and distances without calls. It is contended, that the expressions used must be understood to mean

“*joining on Lunn’s Lot*,” and that the patent for *Deep Point* must be so construed, as that by force of the word *joining*, *Deep Point* cannot be located so as to run into *Lunn’s Lot*, but that the first line must, to its whole extent, run with, and adjoining to, an out line of *Lunn’s Lot*; and it was so adjudged by *Baltimore County Court*.

But we do not perceive any thing in the language of the patent that we think will sustain such a construction. Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances expressed, are to be disregarded, and the lines run to the boundaries, according to the calls. But what boundaries are called for here? Neither the first, nor any other line of *Deep Point*, has a call to the first or any other line of *Lunn’s Lot*, but each is expressed to run a certain course and distance, without any call; and if it be admitted that *Deep Point* must be so located as to adjoin *Lunn’s Lot*, what is there to confine that junction to the first, more than any other line? Or with what line of *Lunn’s Lot* is the junction to be made? That, indeed, is not professed to be ascertained; but the argument is, that the first line of *Deep Point* must join, and run its entire length with *some out line* of *Lunn’s Lot*, which would seem to be entirely arbitrary. The part or line of *Deep Point* to join *Lunn’s Lot*, is no more designated than the part or line of *Lunn’s Lot* to be joined; and the expression *joining* in the patent, would be as fully gratified by a joining at one point, as at another. And if the tree called for as the beginning tree of *Deep Point*, does not stand on a line of *Lunn’s Lot*, it would be impossible to run the first line of *Deep Point* in its whole extent with, and adjoining a line of the latter tract; but a course would have to be shaped to strike it, which would be to add a line to *Deep Point*, and to change the course and distance of the first line, without any express call to authorise it, and to leave the point of termination of that line altogether uncertain, in the place of the course and distance clearly

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expressed, contrary to the ordinary office of calls, which are usually preferred for greater certainty. But we think the patent for *Deep Point* will not admit of such a construction; and that the word *joining*, as there used, is not of such imperative and binding force, as that, that tract of land must be so located as to join on *Lunn's Lot*, and cannot run into it. It seems to us that the expression used, makes no part of the description of the land itself, or of its metes and bounds, but was intended only as a general *designatio loci*, where it was supposed to lie; and that the beginning tree being ascertained, the location of the land from that tree, must be governed by the particular description given by courses and distances, they having no calls or binding expressions to control them.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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December, 1829.

A promissory note given by a member of the vestry of a church, for a debt due, not by him in his individual character, but by the vestry, a corporate body, of which he was a member, without any consideration moving to himself, is a promise to pay the debt of another, without consideration, and void.

The fact, that a note was payable at a future day, where it appeared that it was made for the purpose of closing an account, for which the maker was not responsible independent of the note, does not furnish the slightest presumption that forbearance was purchased by it; for nothing is more common than the closing of accounts by passing notes payable at future days, without the consideration of forbearance being thought of.

The acknowledgment of a defendant, that the promissory note upon which he was sued as maker, was originally given to close an account, which the payee and plaintiff had against the vestry of a church, of which he, the defendant, was a member; and that the money arising from the pew rents was to have been applied to the payment of the same, but that it never had been paid, is not sufficient to take the case out of the Statute of Limitations. It shews that there never was an existing debt due from

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the defendant ; and that when the note was given, it was not to be paid by him, but out of the money arising from the pew rents, which exempts him from any moral obligation to pay.

Where a plaintiff gives in evidence a letter from the defendant, to avoid the Statute of Limitations, he must take the letter as it is.

APPEAL from *Baltimore* County Court.

This was an action of *Assumpsit*, by the appellant, *Philip Rogers*, as surviving executor of *Jeremiah Yellott*, against the appellee, *Hezekiah Waters*, docketted by consent on the 12th of May, 1823.

The declaration contained a count on a promissory note for \$211 62, dated December 17th, 1804, of which the appellee was the maker, and payable six months after date, to the plaintiff's testator. There were also counts for money had and received, paid, laid out, and expended ; and a count on a promise by the defendant, to the plaintiff as executor, in consideration of the said sums of money, due as aforesaid, to the plaintiff's testator.

The defendant pleaded,

1st. *Non assumpsit*. 2nd. *Non assumpsit infra tres annos*. 3d. *Actio non accrevit infra tres annos*. Issue to the first plea ; and general replications to the 2nd and 3d pleas, and issues joined.

At the trial, the plaintiff gave in evidence, that the defendant signed and delivered to the plaintiff's testator the following promissory note: "\$211 62 ; *Baltimore*, 17th December, 1804—Six months after date, I promise to pay to *Jeremiah Yellott*, or order, two hundred and eleven dollars, and sixty-two cents, for value received. *Hezekiah Waters*." And also gave in evidence that letters testamentary were, in due form of law, granted to the plaintiff and one *Samuel Owings*, now deceased, and whom the plaintiff hath survived, as executor of said testator ; he also offered in evidence the following letter, which was written by the defendant, and delivered to the plaintiff: "*Baltimore*, October 22d, 1822. Mr. *Philip Rogers*, Sir: The note in your possession, with my signature, originated in the

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following manner, viz: On settlement of an account with *Capt. Yellott*, some time in the month of February, 1804, there appeared a balance due him of about \$211, being money disbursed and laid out by him in the completion of *St. Peter's Church*, to close which, it was agreed by the vestry and *Capt. Yellott*, that some one of the vestry should sign a note for the balance, payable six months after date, and it was finally concluded, that myself, as one of the vestry, should sign that note, and that money arising from the pew rents, should be applied to the payment of the same. *Capt. Yellott* held this note for more than six months after the time limited for payment, and till the time of his decease, without ever demanding payment, or mentioning any thing on the subject, which induced a hope that he intended to make it a present to the church, he being a vestryman during all this time, if I mistake not. Several years after the decease of *Capt. Yellott*, *Mr. Samuel Owings*, one of his executors, mentioned to me that he had this same note in his possession. I informed *Mr. Owings* in what manner it originated, and at the same time told him, that I would press the vestry to raise the money, and to have it taken up. I accordingly several times mentioned the subject to the vestry without effect, there never being money in the treasurer's hands to meet the current expenses of the church, which several gentlemen in the present vestry must well recollect, as they were members of the former vestries for many years, and till the unpleasant revolution which took place in 1815–1816, since which time I have had very little communication with them. I am under the impression that *Mr. Wm. Jessop*, *Mr. Wm. Krebs*, and *Mr. Francis Hollingsworth* were all present at the time of the statement of the account alluded to above, and that *Mr. Hollingsworth* acted as secretary at the time, and could the book in which *Capt. Yellott* kept the church account be produced, the record made at that time would explain the whole transaction. The foregoing is a just and true statement of this unpleasant business, therefore cannot

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suppose that the administrators of the church property would wish to involve me in trouble, as it is most evident that this money was expended on the church, and has never yet been paid. Would you be pleased to see *Mr. F. Hollingsworth* on the subject; I am confident he must recollect the transaction, and if I am not mistaken, the note in question is in his hand-writing. *Hez. Waters.*” And that the said testator died in the month of February, in the year 1805, and that letters testamentary were granted the said *Samuel* and *Philip*, on the first of March of the same year. Whereupon, the defendant moved the Court to instruct the jury, that if they shall believe the evidence so given as aforesaid, that then the said note was given without a sufficient consideration therefor, moving from the said *Yellott* to the defendant, and therefore does not create a debt or obligation in law upon the defendant, to pay the money in said note mentioned; and also that the said matters so offered do not afford sufficient evidence of his admission or acknowledgment of being indebted, or of his promise to pay any existing debt, and therefore is not sufficient to take this demand out of the operation of the Statute of Limitations, pleaded in this cause; of which opinion on the Statute of Limitations the court (*Hanson, A. J.*) was, and so directed the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

H. W. Rogers, for the appellant, contended,

1st. That the appellee had admitted the actual existence of the debt at the date of his letter of acknowledgment, on the 22d of October, 1822; and,

2d. That the acknowledgment is accompanied by no circumstances intended by the defendant as a defence against the payment; and that if intended as a defence, they are not

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such, as *ex æquo et bono* ought to release him from the payment of the original debt. *Oliver vs. Gray*, 1 *Harr. and Gill*, 216.

S. I. Donaldson for the appellee. The letter of defendant shews there was *no consideration for the note*, moving from plaintiff to him. No moral obligation on his part, *at any time*, to pay it. If so, how can acknowledgment that it had not been paid, after a lapse of nearly eighteen years, *create* a liability?

Examine the phraseology of the letter; settlement with *Capt. Yellott* of balance due him for money “laid out by him in the completion of St. Peter’s Church.” Was defendant bound to pay this money? *Yellott* was a vestryman as well as defendant. No more responsibility resting on one, than the other, and no personal liability in either. The note was agreed by the vestry and *Capt. Yellott* to be signed by one of the vestry, and “it was finally concluded that” defendant, “*as one of the vestry*, should sign the note, and that money arising from pew rents, should be applied to the payment of the same.” It was the mere evidence of debt from vestry to *Capt. Yellott*, *to be paid by funds of vestry*. Was the money advanced on credit of defendants? This is not pretended. If considered then as an engagement to pay the debt of another, void for want of consideration in hands of payee of note, a consideration is necessary to its validity. *Wyman vs. Gray*, 7 *Harris and Johnson*, 409, and *Elliot vs. Giese*, *Ib.* 457.

What was the inference of defendant, from *Capt. Yellott’s* not demanding payment of note when due, and not demanding it as long as he lived? Not that he, the defendant, was to derive any benefit, but that *Yellott* intended to make it *a present to the church*, clearly shewing that defendant never regarded it as a debt which he was bound to pay: *Yellott* never intended it so, and his acts show it. The conversation between defendant and *Samuel Owings*, one

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of the executors, confirms it, as no attempt was then made to recover it from defendant, nor during *Mr. Owing's* life, and the embarrassed state of the pecuniary concerns of the church, shew the reason of the non payment of the debt due from the vestry. If defendant's declarations are relied on by plaintiff, to take a case out of the Act of Limitations, he must take them altogether, and cannot disprove them by other evidence. *Oliver vs. Gray, 1 Harr. and Gill, 204.*

An acknowledgment of a debt, which will take a case out of the statute, must be unqualified and unconditional. *Wetzell vs. Busserd, 11 Wheat. 309. Clementson vs. Williams, 8 Cranch, 72,* and *unaccompanied* with a protestation against the payment of it. *Johnson vs. Burdsee, 15 Johns. Rep. 3,* and no promise to be inferred from declaration of defendant, that he was not holden to pay. *Lawrence vs. Hopkins, 13 Johns. Rep. 288.* Acknowledgments must be of a present subsisting debt, unaccompanied by any qualification or declaration, which, if true, would exempt defendant from moral obligation to pay. *Oliver vs. Gray, 1 Harr. and Gill, 204. Bell vs. Morrison, 1 Pet. Sup. Ct. Rep. 360, 362, 364, 365, 366.* In this case defendant's letter does shew that he never was liable to the payment of this debt, that he was exempt from moral obligation to pay; the debt was due by the vestry of St. Peter's, not by defendant. There must be more than an admission that the debt is unpaid. There must be admission, or proof, that debt ever existed. *Leeper vs. Tatton, 16 East. 421. Lord Ellenborough's Opinion on Trial at Nisi Prius.* Here the evidence shews that debt *never existed.* There can be no ground for reversing the judgment. If viewed as an engagement to pay the debt of another, it is within the principle laid down in *Wain vs. Warlters, 5 East. 10; no consideration appearing on the instrument itself.* This principle was adopted by Court of Appeals, in *Wyman vs. Gray, 7 Harris and Johnson, 409.* In latter case, it was a promissory note,

as in this. Yet it being for a debt due by the *Patapsco Manufacturing Company*, with a right to examine into original consideration, party was held not liable, though maker of note.

BUCHANAN, Ch. J. delivered the opinion of the Court.

This case appears, under former decisions of this Court, to be clear of difficulty.

It is an action of *Assumpsit*, brought upon a promissory note given by the defendant to *Jeremiah Yellott*, the appellant's testator, on the 17th of December, 1804, and payable six months after date, more than twenty years before the bringing of the suit. The issues are upon the pleas of *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*.

To support the issues on his part, and to take the case out of the operation of the Act of Limitations, the appellant produced and read to the jury, a letter addressed to him on the 22d of October, 1822, by the defendant, in which he admits that the money for which the note was passed has not been paid, but alleges, that under an arrangement between *Jeremiah Yellott*, and the *Vestry of St. Peter's Church*, to which body both he and *Yellott* belonged, it was given in order to close the account for a balance due to *Yellott*, on account of money laid out by him in the completion of the church, to be discharged by the application to that purpose, of money arising from the pew rents.

In the case of *Wyman vs. Gray, 7 Harr. and Johnson*, 409, decided by this Court, it was determined, that a note given by an individual corporator, for a debt due by the corporation, and not by him in his individual capacity, and without any new or superadded consideration moving to himself, was a promise to pay the debt of another, and void, there being no sufficient consideration to support it.

Here the letter of the defendant is the evidence produced and relied on, by the appellant himself, and that letter

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proves, that the note, which is the subject of the suit, was given for a debt due, not by him in his individual character, but by the *Vestry of St. Peter's Church*, a corporate body, of which he was a member, but without any consideration moving to himself. It is therefore a promise to pay the debt of another, without consideration, and *nudum pactum* and void. And the question presented by the bill of exception, is, whether the letter of the defendant had the effect to take the case out of the operation of the Act of Limitations?

In *Oliver vs. Gray*, decided by this Court at the June Term, 1827, it was held, that an acknowledgment to take a case out of the Act of Limitations, must be of a present subsisting debt, unaccompanied by any qualification or declarations, *which, if true*, would exempt a defendant from a moral obligation to pay; and that an admission, that the sum claimed has not been paid, is not sufficient without some further admission, or other proof, that the debt once existed. In this case, the defendant does, in his letter, acknowledge that the sum claimed has not been paid, but at the same time he insists, that the note was not given for a debt due by himself, but by the *Vestry of St. Peter's Church*, under an agreement between the vestry and *Yellott*, that it should be signed by *him* to close the account, but to be paid out of money arising from the pew rents. There was no consideration moving to the defendant, nor any antecedent debt due by him individually; no consideration of forbearance expressed in the note, as the consideration upon which it was given, as has been supposed. Nor is there any evidence of such a consideration, *de hors* the note. It is, to be sure, made payable six months after date, but it was given (according to the appellant's own proof, as contained in the defendant's letter, which, as he has introduced it, he must take it as it is) for the purpose of closing account, on the settlement of which that amount was found to be due to him from the vestry of *St. Peter's Church*, which by no means proves, or furnishes the slightest pre-

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sumption, that the forbearance of *Yellott* to sue the vestry, was purchased by the giving of that note; on the contrary, if we were to deal in conjecture, it would rather seem, that the favor, if any, was a favor to him, in thus closing an account open upon the books. And perhaps nothing is more common than the closing accounts by passing notes, payable at future days, without the consideration or forbearance being thought of. To suppose that it was given for the consideration of forbearance, looking to the note itself, would be to give to it a construction unauthorised by any thing appearing upon the face of it, and to offer violence to the evidence, which asserts that it was given for the purpose only of closing an open account, and being the acknowledgment of the party offered by the appellant to take the case out of the Act of Limitations, and the only evidence in the cause, except the note itself, he must be content to take it altogether, as it stands, and cannot garble it, and select such parts as will suit his purposes, and reject the residue; otherwise it would be to take the case out of the Act of Limitations by other proof than the acknowledgment of the defendant, and that cannot be: which would be the effect of the remote inference, that the note was given for the consideration of forbearance, drawn from the mere circumstance that it is made payable at a future day, in opposition to the allegation that the object of it was to close the account between *Yellott* and the vestry, and that it was to be paid out of money arising from the pew rents; which shows that the payment of it by him individually, was not contemplated by any of the parties.

That part of the letter relied upon, is in these words: "On settlement of an account with *Capt. Yellott*, some time in the month of February, 1804, there appeared a balance due him of about \$211, being money disbursed and laid out by him in the completion of *St. Peter's Church*, to close which, it was agreed by the vestry and *Capt. Yellott*, that some one of the vestry should sign a note for the balance, payable six months after date; and it was finally

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concluded, that myself, as one of the vestry, should sign that note, and that money arising from the pew rents, should be applied to the payment of the same.”

The note then, being a promise, or agreement to pay the debt of another, and void for want of a sufficient consideration moving to the defendant, there never was an existing debt due by him; and his acknowledgment that the sum claimed has not been paid, is not an admission of any present subsisting debt. And the understanding at the time the note was given, that it was not to be paid by him, but out of money arising from the pew rents, exempts him from any *moral* obligation to pay it. I think, therefore, that the acknowledgment of the defendant, was not sufficient to take the case out of the Act of Limitations, and that the direction given to the jury was right.

JUDGMENT AFFIRMED.

WINCHESTER, Trustee of WILLIAMS, vs. The UNION
BANK OF MARYLAND.—*December, 1829.*

In a suit by a trustee of an insolvent debtor, claiming in his character of trustee, a general issue plea does not admit the character in which the plaintiff sues.

To establish the right of such a trustee, the plaintiff, under the general issue, must prove every thing essential to the showing himself clothed with the character and authority of a trustee, which cannot be done by the production of the certificate of the commissioners of insolvent debtors, and the final discharge of the insolvent only, but all the proceedings must be exhibited.

The different insolvent laws of this State constitute one general system and must be construed together; and so construed, require a bond with *security* to be given, before a trustee can act as such, without which, he cannot be invested with the character and rights of a trustee. To estab-

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lish his character as trustee, and his right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself.

APPEAL from *Baltimore County Court*.

This was an action of *Assumpsit* brought by the appellant, as trustee of *James Williams*, against the appellees, the *President and Directors* of the *Union Bank of Maryland*. The declaration contained a count, for goods, wares, and merchandise, sold and delivered; for money paid, laid out, and expended; money had and received; and on an *insimul computassent*. *Non assumpsit* was pleaded, and issue.

At the trial, the plaintiff offered in evidence the insolvent papers of *James Williams*, consisting of the petition of the said *James Williams* to one of the judges of *Baltimore County Court*, setting forth his actual confinement in the gaol of *Baltimore county*, for debts which he was unable to pay, and his willingness to deliver up his property to the use of his creditors. This petition was accompanied with “a list of debts due by *James Williams*:” “of debts due, and property belonging to *James Williams*,” and an affidavit of their truth; proof of *Williams*’s residence in the State for the two years next preceding his application; the certificate of the sheriff of *Baltimore county*, of said *Williams* being in actual confinement for debt alone, with the reference of the application by the judge aforesaid, to the commissioners of insolvent debtors; the bond of *James Williams*, with security for his appearance before the commissioners, and *Baltimore County Court*; the bond of *George Winchester*, dated 24th June, 1819, for the performance of the duties of *provisional trustee* of the said *Williams*; the conveyance from *Williams* to *Winchester* of all his property, in trust, for his creditors, duly acknowledged; the receipt of *Winchester*, as trustee, for all *Williams*’s property; the certificate of the commissioners, that *Winchester* had been appointed *provisional trustee*, and had certified to them that he was in possession

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of *Williams's* property; the *personal* discharge granted by one of the judges of *Baltimore County Court* to *Williams*; the bond of *George Winchester*, (without security) to perform the duties of *permanent* trustee of the said *Williams*, dated 2d August, 1819; the certificate of the commissioners aforesaid, dated 25th September, 1819, addressed to *Baltimore County Court*, that they had examined *Williams's* case, that he had acted fairly and *bona fide*; and the final discharge awarded to *Williams* by said Court, from all debts due by him prior to the 24th June, 1819, with the usual exception of subsequent acquisitions by gift, descent, bequest, devise, or distribution, in his own right.

And the plaintiff further offered in evidence, that the said *James Williams* stopped payment, and his notes were protested in and by the said *Union Bank* on the first day of *June*, 1819; he further offered in evidence, the record entries on the application of the said *James Williams* for the benefit of the insolvent laws of *Maryland*, from which it appeared that he applied for the benefit of said insolvent laws on the 24th day of *June*, 1819, and that *George Winchester*, the plaintiff, was appointed provisional and permanent trustee of said *Williams*, by the commissioners of insolvent debtors, and gave his single bond *without security*, for the faithful performance of his duty as such trustee. The plaintiff further offered in evidence, a deed of assignment from *James Williams* and *John Gooding*, of the brig *Ariel* and cargo, dated *Baltimore*, 4th *June*, 1819, to secure a debt previously due from the grantors to the bank, (a recital of which is not material to the questions ultimately decided,) and then proved that the said *Union Bank* accepted the said brig and cargo at the valuation of sixty-five thousand dollars; and that some portion at least, if not all, the proceeds of the said brig and cargo, in money, came to the possession of, and was received by, the said *Union Bank*, before the commencement of this suit. Whereupon the defendants, by their counsel, prayed the Court to instruct and direct the jury, that the plaintiff was not entitled to re-

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cover, because he had not given bond, with security, for the faithful performance of his duty as trustee of the said *James Williams*; because there is no privity between the plaintiff, as trustee of *James Williams*, and the defendants, so as to enable him to support this suit; which instruction and direction the Court (ARCHER, Ch. J., and HANSON, A. J.) gave.

The plaintiff excepted; and the verdict and judgment being against him, he appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and STEPHEN, J.

R. Johnson and *Raymond*, for appellant, contended,

1. That the certificate of the commissioners of insolvent debtors, that the insolvent had complied with the requisitions of the statute, and the final discharge of the insolvent by the Court, is conclusive evidence of the regularity of the proceedings in the insolvent debtors' court, and cannot be collaterally reviewed in a suit between the trustee and a debtor of the insolvent. 2. That under the act of 1816, establishing the insolvent debtors' court, a permanent trustee is not required to give bond, with security. 3. The defect, if it be one, of the trustee not having given bond, can only be taken advantage of by plea in abatement. They referred to *Stark. Evid.* 547, 548. *Cox's Dig. title ex'r. &c.* 14. *Childress vs. Emory*, 8 *Wheat.* 642. *De Wolf vs. Rabaud*, 1 *Peters' Rep.* 498. 3 *Bac. Abr.* 53. *Kennedy vs. Boggs*, 5 *Harr. and Johns.* 403.

Taney, (Attorney General) and *Kennedy*, for the appellees, referred to *Childress vs. Emory*, 8 *Wheat.* 671. 2 *Stark. Evid.* 168, (note.) *The act of 1798, ch. 101, sub. ch. 3, s. 8.* 2 *Stark. Ev.* 192. *Snelgrove vs. Hunt*, 3 *Serg. and Low.* 414. 2 *Phill. Ev.* 259, 289. *Evans vs. Mann*, *Cowp.* 569. *Hunter vs. Potts*, 4 *Term Rep.* 182. 3 *Bac. Abr.* 53. *Harper vs. Hampton*, 1 *Harr. and Johns.* 622. *Johnson vs. Collings*, 1 *East's. Rep.* 98. 3 *Bos.*

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and Pull. 559. 3 East. 177. 1 Camp. 175. 2 Stark. Evid. 173. 1 Stark. Rep. 481.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This is an action of *assumpsit* brought by the appellant in *Baltimore* County Court, as trustee of *James Williams*, an insolvent debtor.

The declaration contains the usual counts, for goods sold and delivered, money lent, &c., to which there is the general issue plea of *non assumpsit*.

The appellant claims in the character of trustee; and at the trial, for the purpose of proving his title, and right to recover, produced in evidence the papers and proceedings connected with the application and final discharge of *Williams*, the insolvent. By which it appears, that the bond given by the appellant for the performance of his duty as trustee, is without security, for which reason the Court below instructed the jury, that he was not entitled to recover. And it is here contended, 1st. That the certificate of the commissioners of insolvent debtors for the city and county of *Baltimore*, that *Williams*, the insolvent, had complied with all the requisitions of the insolvent laws, and his final discharge, are conclusive evidence of the regularity of the proceedings, and of the insolvency of *Williams*, and of the appellant's right to sue in an action between him as trustee, and a debtor of the insolvent. 2d. That under the insolvent laws of the State, a trustee of an insolvent debtor discharged in the city of *Baltimore*, is not required to give bond, with security, for the faithful discharge of his duty. And 3d. That if a bond, with security, is required to be given by a trustee of an insolvent debtor, he not having given such a bond, can only be taken advantage of by a debtor of the insolvent, in a suit by the trustee, by a plea in abatement, and not on a plea of *non assumpsit*.

The whole of these points were raised in argument, and elaborately discussed, in the case of *Houck vs. Crouse*, decided by this Court at June Term, 1828, in which it

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was held, that in a suit by a trustee of an insolvent debtor, claiming in his character of trustee, and not in his own right, a general issue plea does not admit the character in which the plaintiff sues, but that such a suit is analagous to the case of an assignee of a bankrupt claiming in that character; and that on the general issue, the plaintiff must prove every thing essential to the showing himself clothed with the character and authority of a trustee; which could not be done by the production of the certificate of the commissioners and the final discharge of the insolvent only, but that all the proceedings must be exhibited. That the different insolvent laws of the State constitute one general system, and must be construed together; and so construed, require a bond, with security, to be given by the trustee, before he can act as such, without which he cannot be invested with the character and rights of a trustee. That to establish his character as trustee, and right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself, and not by the production merely of the certificate of the commissioners, that the insolvent had complied with all the requisitions of the insolvent laws, and his final discharge; and that if he does not do so, the defendant is not driven to a plea in abatement, but may take advantage of it on the general issue. And we have heard nothing in the argument of this case to induce a departure from what was decided in the case of *Houck vs. Crouse*. We concur, therefore, with the Court below, in the instruction given to the jury.*

JUDGMENT AFFIRMED.

Winchester, Trustee of Gooding, vs. The Union Bank of Maryland.—1829.

WINCHESTER, Trustee of GOODING, vs. The UNION BANK
OF MARYLAND.—December, 1829.

The trustee of an insolvent debtor derives his right from his appointment, and the insolvent laws requiring that he shall give bond with security, for the faithful performance of his duty, before he acts as such, until such bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any manner intermeddle with the property of the insolvent.

So one appointed such trustee, having given bond after he brought suit, cannot maintain it.

APPEAL from *Baltimore County Court*.

This was an action of *assumpsit*, instituted by the appellant on the 15th day of September, 1823, against the appellees, the *President and Directors of the Union Bank of Maryland*. The pleadings and evidence were the same as in the preceding case of *Winchester, trustee of Williams, vs. the Union Bank*, with this difference, that after the commencement of the suit, and before trial, that is to say on the 28th of April, 1825, the appellant, as permanent trustee of *John Gooding*, filed a bond, with approved security. The defendants made the same prayers, and obtained the same instruction from the Court as in the previous case, and the verdict and judgment being in their favor, the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and STEPHEN, J.

R. Johnson, and *Raymond*, for the appellants.

In addition to the points made in the other case, they contended, that the trustee having given bond, with security, approved by the Court, after the commencement of the suit, but before trial, the bond relates to the original appointment of the trustee, and renders the proceedings valid *ab initio*. They further contended, that the plea of *non assumpsit*, admitted the trustee to have been legally

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appointed and qualified. On the 1st additional point, they cited *the Act of 1805, ch. 110, s. 4.* 1808, *ch. 71, s. 3.* 3 *Bac. Abr. tit. ex'r. §c. 52.* 5 *Jacobs' L. D. tit. relation.* On the 2nd. they referred to *Henderson vs. Parker*, 3 *Harris and Johnson*, 117.

Taney, (Attorney General) and *Kennedy* for the appellees, referred to *the Act of 1805, ch. 110.* 1808, *ch. 71,* and 1812, *ch. 77.* 2 *Stark. Evid.* 109. 3 *Bac. Abr.* 53.

BUCHANAN, Ch. J. delivered the opinion of the Court.

This case is, in all respects, the same as that of *Winchester*, trustee of *Williams*, against the *Union Bank*, just decided, with this difference only; that here a bond, with security, appears to have been given by the trustee, but subsequent to the bringing of the suit, though before the trial. And it is contended, in addition to the several points raised and decided in that case, that the bond thus given, has such relation back, as to entitle the plaintiff to recover.

But this is not like the case of an executor, who derives all his interest from the will; and though *probate* is necessary to the authentication of his right, yet it is the will alone which gives it, and the *probate* is only the legitimate evidence of his title. He may, therefore, sue, but cannot declare before probate, for he cannot assert his right in Court, as an executor, without producing his letters testamentary. It may, more properly, be assimilated to the case of an assignee of a bankrupt, who derives his title from the assignment, which divests the bankrupt of his personal property, and vests it in the assignee from the time of the bankruptcy; or in this particular, to the case of an administrator, who derives his title from his letters of administration, and cannot sue, or do any other act, before letters of administration granted, though when administration is granted, it vests the property in the administrator by relation, from the time of the death of the intestate.

So a trustee of an insolvent debtor derives his right from

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his appointment; and the insolvent laws requiring that he shall give bond, with security, for the faithful performance of his duty, before he acts as such; until such a bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any other manner intermeddle with the property of the insolvent. He is not, in contemplation of law, a trustee; his character as such is not completed, until the bond required, is given. The mere appointment, unaccompanied by his giving a bond, with security, confers upon him no power over the goods of the insolvent; but it is the bond, as constituting an ingredient in the appointment, and is the perfection of it, that gives him authority to act, and assert his rights in the character of trustee.

The bond, therefore, in this case, having been given after the suit was brought, the suit was instituted when the plaintiff was not clothed with any power to sue, or in any manner to interfere with the property of the insolvent, in the capacity of trustee, and cannot be maintained.

JUDGMENT AFFIRMED.

HAMMOND *et. al.* vs. STIER.—*December, 1829.*

Upon a petition by several heirs-at-law, certain real estate in which they were jointly interested, and which was not susceptible of a beneficial division among them, was decreed to be sold. A trustee was appointed; the land sold; and a report of the trustee, stating the proceeds of sale to be in his hands, was ratified and confirmed by the Court. Before the auditor had distributed these proceeds among the heirs, one of them, who was a married woman, died. HELD, That her surviving husband was entitled to her distributive share of the sale.

APPEAL from *Frederick County Court*, as a Court of Equity.

In *March, 1823*, a petition was filed by the heirs of *Vachel*

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Hammond, formerly of *Frederick* county, deceased, setting forth that said *Vachel* died in December, 1821, seized and possessed of certain real estate in said county, which they pray may be sold, for the purpose of distribution among them, the same not being susceptible of division. The petition represented that some of the heirs were of full age, some *femes covert*, and some minors.

A decree at the same term accordingly passed, for the sale of said real estate, which sale was duly made and reported, (the report stating the proceeds to be in the trustee's hands) ratified and confirmed by the Court, at July Term, 1823. Afterwards, to wit, at August Term, 1826, the auditor of the said Court made his report, accompanied with an account between the estate of the said *Vachel Hammond* and the trustee, in which he allows "to the legal representative or representatives of *Elizabeth Stier*, deceased, wife of *Frederick Stier*, and who was one of the daughters and heirs of said deceased, (*Vachel Hammond*) the proportion coming to her from said estate," she the said *Elizabeth Stier*, having before that time departed this life, leaving her husband, *Frederick Stier*, alive, and three children, minors, (who are the appellants in this cause.) On this report, the Court (SHRIVER, A. J.) passed the following order: "Ordered, That the report of the auditor be, and the same is hereby ratified and confirmed; and that the trustee pay the proceeds accordingly, except the amount audited to the heirs of *Elizabeth Stier* deceased, which the trustee is required to retain until the further order of this Court in the premises." At the same term a petition was filed by the said *Frederick Stier*, the appellee, the husband of *Elizabeth Stier* deceased, setting forth the proceedings upon the aforesaid petition for the sale of *Vachel Hammond's* property. That on or about the 20th of March, 1825, the said *Elizabeth*, the former wife of the petitioner, departed this life, intestate, leaving the petitioner, her husband, surviving her, and claiming in that character, in the same manner as if he had taken out administration on her estate,

her proportion of the proceeds of the said real estate of her father, *Vachel Hammond*.

It was admitted that *Elizabeth Stier* died intestate on the 20th of March, 1825.

A petition was also filed at the same term by the appellants, (by their next friend and guardian, *Thomas Hammond*) referring likewise to the before mentioned proceedings, for the sale of *Vachel Hammond's* real estate, and claiming the proportion of the proceeds thereof, to which the said *Elizabeth Stier* would have been entitled, as her infant children, and heirs at law, "the said proportion arising from the sale of real estate belonging to the said *Elizabeth Stier*."

The County Court (SHRIVER and TH. BUCHANAN, A. J.) on the 14th of November, 1826, ordered and adjudged, "that the report of the auditor in said cause, be, and it is hereby ratified and confirmed; and further adjudged and ordered, that the trustee pay to *Frederick Stier* accordingly his wife's proportion of her father's estate, amounting &c."

From this decree, the petitioners, *Adeline Hammond et. al.* appealed to the Court of Appeals.

This case was submitted to the Court of Appeals, on the notes of counsel.

Tyson for the appellant, contended, that the County Court erred, because the estate of the said *Elizabeth Stier*, in the premises was real, or such as should, in a Court of Equity, be regarded as real property, at the time of her death. It might be thought at first sight, that the case of *Rogers vs. Krebs et. al.*, 6 Harr. and Johns. 31, contains a decision in point. It is there stated, that "where the real estate of a *feme covert* is sold under the act to direct descents, the mutation of her estate from real to personal, is complete, when the commissioners' sale is ratified by the Court, and the purchaser has complied with the terms of it, by paying the purchase money, (if the sale was for cash) or by giving

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bonds to the representatives, if the sale was on credit." This case was relied upon by this Court as their authority for adjudging that of *Leadenham vs. Nicholson*, 1 *Harris and Gill*, 279. There, was a mutation of a *feme covert's* estate from real to personal. The difference between the two cases, and the difference between this and the first cited case, is this: In the first case, the bonds were given directly to the representatives, and in that way became *choses in action*, and of course reducible by the husband, or reduced into possession: in the two other cases, there was interposed between the parties a trustee, in whom the whole legal interest was vested. In the case now before the Court, how was it vested? As real estate. When did it cease to be real estate? surely not while the trusteeship lasted. When did that terminate? only when there was a fulfilment of the trust. It certainly did not terminate in this case, at the time of *Elizabeth Stier's* decease in 1825, nor was it terminated at the time of the audit. Will it be said that the nature of the trust was changed by the death of *Elizabeth Stier*? Certainly it was not in favor of the other parties beneficially interested. The fund was real estate, as to them. How then could it be personal estate as to *Elizabeth*? Can a trustee support this double character? or can any thing but the extraordinary power of the Court of Chancery change the character of a trustee; can it be changed by circumstances?

The ground of the decision in the case of *Rogers vs. Krebs*, was, that the bonds were *choses in action*. The ground in this case of *Frederick Stier's* claim, must be the same. Can there be a *chose in action*, when there is no cause of action? and what cause of action had *Elizabeth Stier* at the time of her death in 1825; or did any cause of action accrue before the confirmation of the auditor's account in 1826. How could the husband become entitled to this as a *chose in action*? Under all the circumstances of the case, it is submitted, whether, *at the time of Elizabeth Stier's death*, she had any *chose in action*, or any personal interest

that could be reduced into possession by her husband? If not, what subsequent act of her husband can make that a *chose in action* of *Elizabeth Stier*, which was not so at the time of her death.

A. Randall for the appellee, contended,

1. When those entitled to real estate, make an application to a Court of Chancery for the sale thereof, in order to the advantageous distribution of the proceeds, and the Court decrees a sale, and appoints a trustee therefor, who makes a report, stating that the sale has been made, and that the proceeds of the estate are then in his hands, according to the decree, which report is ratified and confirmed; then and in that case, a mutation of real estate into personalty is complete. 2. That if a *feme covert*, entitled to a proportion of such proceeds, die after the ratification of the sale, and compliance with the terms thereof by the purchaser, her husband surviving, the interest of the wife is a *chose in action*, which the husband is entitled to, if he, during his life, reduce the same into possession. 3. That the order of the Court, directing the trustee to pay over to the husband his wife's proportion of the proceeds of the sale of the real estate, is a reduction into the husband's possession, and makes the same absolutely his own. He cited, 2 *Pow.* 84. *State vs. Krebs*, 6 *Harr. and Johns.* 31. *Stevens vs. Richardson*, 6 *Harr. and Johns.* 156. *Jarrett's Lessee vs. Cooley*, *ib.* 258. *Leadenham's Ex'r. vs. Nicholson, et. al.*, 1 *Harr. and Gill*, 267. *Hurt vs. Fisher*, *ib.* 88.

BUCHANAN, Ch. J. We consider the case of *Leadenham vs. Nicholson, et. al.*, decided at June Term, 1827, as conclusive in this case, and

AFFIRM THE DECREE.

ALLENDER, Adm'r. D. B. N. of WYSE, vs. RISTON.
December, 1829.

W. died intestate in 1814, as to his personal estate. Administration was granted to his widow, who returned an inventory, and in 1816 settled an account with the Orphans Court, in which she obtained credit for various payments. She, with several, but not all, of the deceased's children, in 1822 united in a mortgage to the defendant, of some of the personal property which the intestate left, to secure the payment of a debt, for which the mortgagors were responsible to the defendant. The mortgage did not profess to be executed by the widow, in her representative character ; and it did not appear that any of the intestate's debts remained unpaid. The widow died, and in 1823 the plaintiff was appointed administrator d. b. n. of W, and brought replevin against the defendant, who claimed the goods under his mortgage. HELD, That in as much as strong circumstances existed in the case, to induce the presumption that the intestate's debts had been all satisfied, it was fair to infer that the administratrix had made distribution of the remaining assets, and acted in her character of distributee, in making the mortgage ; that therefore the plaintiff was not entitled to recover.

An inventory made and returned by an administrator to the Orphans Court, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the cause ; for he might become personally liable for the costs of the suit.

The sheriff's schedule of goods returned, as taken and delivered in an action of replevin at the suit of R, may be read in evidence by the plaintiff, (who was one of the defendants in the replevin,) in an action against R, for the purpose of proving that R was in possession of the same goods, on the day after they were first taken.

APPEAL from *Baltimore County Court*.

This was an action of *Replevin* brought on the 16th of July, 1823, by the now appellant, against the appellee, for certain goods and chattels, and negro slaves. The defendant (the appellee) pleaded *non cepit*, and property in himself. Issue was joined to the first plea, and general replication and issue to the second plea.

1. At the trial the plaintiff gave in evidence that *William Wyse*, the plaintiff's testator, departed this life at his residence in *Baltimore* county, about the year 1814, leaving

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the following last will and testament: "*Baltimore*, 12th March, 1814—Having at this perilous moment of my life committed myself to the care of Almighty God, whom I trust will receive my soul, I have only to request my affectionate wife and son *John*, in case of a deficiency of my estate, to support and educate my children; that my real estate, known by the name of *the Deer Park*, be disposed of for the maintenance of said children, under the direction of my wife *Rachel*, and *John Wyse*."

The will was proved on the 12th of April, 1814, by two of the subscribing witnesses, &c. That after his death, letters of administration, with the will annexed, were duly granted to *Rachel Wyse*, the widow of the said testator, who took upon herself the execution of said trust. That the said *Rachel Wyse*, as administratrix aforesaid, returned to the Orphans Court of *Baltimore county* the following inventory and account. The inventory was dated the 8th of July, 1814, and proved by the administratrix on the 23d of July, 1814, amounting to \$6735 25. The first account was settled by the administratrix with the Orphans Court on the 29th of June, 1816, in which she charged herself with the amount of the inventory, \$6735 25. Also for cash received from sundry persons, \$270, being a total of \$7,005 25. She craved allowance for sundry payments and disbursements, \$1292 91, leaving a balance due the estate of \$5712 34. And died about the month of April, 1823, having returned no other account than that above stated, of her administration aforesaid. The plaintiff further gave in evidence, that at the death of the said *William Wyse*, he was entitled to, and in possession of, the property in dispute in this cause, and that the same continued in the possession of the said *Rachel Wyse* until her death. He further gave in evidence, that after the death of the said *Rachel Wyse*, letters of administration *de bonis non*, on the estate of the said *William Wyse*, were duly granted to the plaintiff in this cause; and that the plaintiff, as such administrator, returned to the Orphans Court of *Baltimore county* the following inventory:

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The inventory, made by certain appraisers in the usual form, was dated the 23d of January, 1824, amounting to \$2293, and proved by the plaintiff, as administrator afore-said, on the 3d of February, 1824. On the back of the inventory is thus written: "All the goods and chattels described in the within inventory, are claimed by *George Riston*, and actions are now depending in *Baltimore County Court* for the purpose of trying the right of the said *George Riston*, and also the right of the administrator, to the said goods and chattels." Signed by the administrator *de bonis non*, &c. The plaintiff further gave in evidence, that no other proceedings in relation to the said estate of the said *William Wyse*, deceased, except those above stated, have been had in the Orphans Court. He also gave in evidence, that the said *William Wyse* left a widow, the above named *Rachel Wyse*, and eight children, namely, *John M.*, *William A.*, (a) *Margaret*, *Nicholas*, *Edward*, *Matilda*, and *Octavius*, all of whom, except the three first, are minors, and yet living. He further gave in evidence, that the property in controversy in this case, was replevied out of the possession of the present defendant, and that such property is the same as that mentioned in the foregoing inventories.

The defendant then offered in evidence the following instrument of writing, under the attestation and certificate of the clerk of *Baltimore County Court* thereupon endorsed. This was a deed of mortgage, dated the 16th of May, 1822, between *Rachel Wyse*, widow of *William Wyse*, deceased, *John M. Wyse*, *William A. Wyse* and *Eliza Wyse*, stating that the grantors were indebted to the grantee in the sum of \$2000 upon a promissory note then drawn by the said *John M. Wyse*, in favor of the said *Rachel*, or order, and by her and the said *William A.* and *Eliza* endorsed, payable 12 months after date; and for the purpose of securing the payment of the said sum of money at the time limited by the said promissory note for the payment thereof, the

(a) The name of *Eliza* is omitted, probably by mistake.

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grantors agreed to execute these presents—whereby was granted, &c. to the said grantee, “his heirs, executors, administrators and assigns, all the right and estate whatsoever, both in law and equity, of the said *Rachel Wyse, John M. Wyse, William A. Wyse* and *Eliza Wyse*, and each of them, as well of, in, to and out of, all that lot of ground number 49, situate and lying on *Fell's Point* in the city of *Baltimore*,” &c. “as in all and singular other the real and personal estate of every description, whereof the said *William Wyse* died seized or possessed, or to which he was in any manner entitled at the time of his death, wherever the same may be. To have and to hold all and singular the real said and personal estate, property and premises,” &c. unto the said *George Riston*, his heirs, executors, administrators and assigns,” &c. The defendant also offered in evidence, that *Rachel Wyse*, the administratrix of *William Wyse*, deceased, and one of the said mortgagors, were at the time of the execution and delivery of the said instrument of writing to the defendant, in the actual possession of the property therein mentioned, and that the personal property is the same property mentioned in the declaration in this cause. That the said *Rachel Wyse*, upon the death of her husband, had taken possession of the said property as administratrix; and that she and the other mortgagors had lived upon the farm from the time of the death aforesaid, and used the said personal property as their own, until the time of the execution of the said instrument of writing, and afterwards. That they had no other personal property. The defendant then prayed the opinion of the Court, and its direction to the jury, that by the said instrument of writing, such an interest in and to the property therein mentioned, passed to the defendant, as prevents the plaintiff, as administrator *de bonis non* of *William Wyse*, from maintaining the present action, and that he is not entitled to recover. Of which opinion the Court (HANSON, A. J.) was, and instructed the jury as prayed by the defendant. The plaintiff excepted.

2. The plaintiff then asked the opinion of the Court, and

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their direction to the jury, upon all the evidence stated in the plaintiff's next preceding bill of exceptions. 1st. That the said deed of mortgage, so given in evidence by the defendant in such prior bill of exceptions, operated to pass no more of the personal estate of *William Wyse*, deceased, than the interest and share to which the parties, mortgagors to such mortgage, were respectively entitled, as the widow and distributees of *William Wyse*, deceased," after the payment of the debts of the said deceased. 2d. That the said deed conveys no interest in the said estate to which the said *Rachel Wyse*, one of the parties thereto, was entitled as administratrix. 3d. That the said *Rachel Wyse* had no legal authority to execute the said deed, as administratrix, so as to transfer any interest she had in the said estate as administratrix. 4th. That as she does not describe herself in the said deed as administratrix of the said *William Wyse*, the true construction of the deed is, that she did not intend thereby to transfer her interest in the said estate, as administratrix. 5th. That inasmuch as the consideration stated in the said deed, is to secure a debt due by the said *Rachel Wyse*, in her individual character, as the endorser of the note in the said deed mentioned, that the same was not such a fair and *bona fide* consideration as would render the said deed legal and valid to pass any other interest in the personal estate of the said *William Wyse*, than the interest which she and the other mortgagors had in the said estate as the distributees thereof. But the Court refused to give each and every of the said opinions to the jury. The plaintiff excepted.

3. The plaintiff having offered in evidence the letters of administration granted on the estate of *William Wyse*, deceased, to *Rachel Wyse*, on the 12th of April, 1814, and the inventory returned by her to the Orphans Court of *Baltimore* county, in which county the said *William Wyse* died, of the personal estate of which the said deceased died possessed, dated the 23d of July, 1814, and having proved that the said *Rachel Wyse* departed this life in the year 1821

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or 1822, and having offered in evidence the letters of administration *de bonis non* on the estate of the said *William Wyse*, granted to the plaintiff the 16th of July, 1823, then offered in evidence the paper purporting to be an authenticated copy of the inventory of the estate of *William Wyse*, returned by the plaintiff, as administrator *de bonis non* afore-said, for the purpose of proving that the articles of property contained in the said last inventory were the property in possession of the said *Rachel Wyse*, as administratrix afore-said, at the time of her death unadministered, (being the same as inserted in the first bill of exceptions.) The defendant objected to this evidence, 1st. Because the said inventory was not made or exhibited until after the commencement of this suit. 2d. That it afforded no evidence that the property therein mentioned was the same for which this suit was brought. 3d. That the said inventory having been made by the plaintiff, it was, therefore, incompetent evidence. 4th. That the said inventory does not appear to have been judicially sanctioned by the Orphans Court, otherwise than by admitting the same to be recorded; nor to have been otherwise verified in the Orphans Court, except by the bare oath of the plaintiff himself. 5th. That the said paper so offered, does not, in any respect, conduce as proof to the object for which it is offered, nor to prove the issue in this case. The Court were of opinion that the said paper, so offered in evidence, was competent and legal proof to show the fact that such an inventory was made and given by the plaintiff in the Orphans Court; but not to prove that the property therein mentioned belonged to the plaintiff or his intestate; and refused to let the said inventory be read in evidence for the purpose for which it was offered by the plaintiff. The plaintiff excepted.

4. The plaintiff, to prove the property or some part thereof, in the declaration mentioned, to have been in the possession of the defendant at the time of the replevin, offered in evidence by *P. Codd*, a competent witness, that the property in the declaration mentioned was on the farm

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occupied by *William Wyse* in his life time, and *John M. Wyse*, his son, at the time of the service of the writ of replevin in this case. That the same property had not been taken possession of, or removed by the defendant, except a small portion of the furniture which had been put in the defendant's wagon; but when so put in the wagon, the defendant was not on the premises. And the witness states that he does not remember whether the schedule and receipt, hereinafter referred to, were signed by the defendant, on the farm, or in the city of *Baltimore*; but when the witness went on the premises, *Mr. Fishach*, the agent of the defendant, was there, and loading the wagons by the defendant's direction. The negroes were not in the wagon. The witness saw no opposition at the time made by any person to the defendant's taking the property. The witness stated that he did not recollect any thing of the property, more than he finds mentioned in the schedule in his handwriting. He saw the property on the place, and in the hands of *John M. Wyse*. Upon explaining this part of his testimony, the witness states that he did not mean thereby to say the property not in the wagon was in the actual possession of *John M. Wyse*, or that any part of it was so: that he did not know the property to have been *William Wyse's*. The plaintiff then offered in evidence the following paper: "A schedule of the goods and chattels of *John M. Wyse, Eliza Wyse* and *William A. Wyse*, seized and taken at the suit of *George Riston*, by virtue of a writ of replevin issued out of *Baltimore County Court*, and to the sheriff thereof directed, and appraised by us, the subscribers, after being duly summoned and sworn for that purpose. Given under our hands and seals, this — day of July, 1823. One negro girl named *Nan*, aged 15, \$230," &c. The whole amounting to \$1905 37½, and signed by the appraisers. Also a receipt dated the 15th of July, 1823, signed by *Riston*, stating that he had received from the sheriff of *Baltimore county* "the foregoing list of goods, as per schedule." Which paper, it was admitted, was one

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of the papers of record in this Court in the cause in which *George Riston* was plaintiff, and *John M. Wyse, Eliza Wyse* and *William A. Wyse*, were defendants, and was the schedule prepared and returned in that cause by the sheriff of *Baltimore* county. To the reading of which paper to the jury, the defendant objected as incompetent evidence. 1st. Because the said paper is a part of the proceedings in another cause; and that it is not competent for the plaintiff to offer such evidence without producing the whole of the proceedings in the said cause. 2d. Because the said proceedings are in a cause between other and different parties. 3d. Because the said evidence is not relative to the issue on the part of the plaintiff in this cause. But the Court overruled the objection, and permitted the said paper to be read to the jury. The defendant excepted. Verdict and judgment for the defendant, and the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

J. Scott, for the appellant, contended,

1. That the property mentioned in the proceedings in this cause, passed to, and vested in, *Joseph Allender*, the appellant, as administrator *de bonis non* of *William Wyse*.
2. That the deed of mortgage, given in evidence by the defendant, operated to pass no more of the personal estate of the said *William Wyse*, deceased, than the interest or share to which the parties, mortgagors, were respectively entitled, as the widow and distributees of the said testator, after the payment of his debts.
3. That the said deed conveyed no interest in said estate, to which *Rachel Wyse* was entitled, as administratrix of the said *William Wyse*.
4. That the said *Rachel Wyse* had no legal authority, as administratrix, to execute the said deed, and transfer any interest which she held as administratrix in the said personal estate.
5. That as she does not describe herself as administratrix,

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the true construction of the said deed is, that she did not intend by the same to transfer her interest in the same, as administratrix. 6. That inasmuch as the consideration stated in the deed is to secure a debt due by the said *Rachel Wyse*, in her individual character, as the endorser of the note mentioned in the said deed, that the same was not such a fair and *bona fide* consideration, as would render the same deed legal and valid, to pass any other interest in the personal estate of the said testator, than the interest which the said *Rachel Wyse*, and the other mortgagors had in the said personal estate, as the distributees thereof. 7. That the inventory returned by the plaintiff to the Orphans Court, was competent evidence to go to the jury, for the purposes for which it was offered. He referred in his argument to *Haslett's Adm'r. d. b. n. vs. Glenn*, 7 *Harr. and Johns.* 17, and *Hill vs. Simpson*, 7 *Ves.* 168.

Glenn, for the appellee, submitted on notes. *William Wyse* died in March, 1814, intestate as to his personal estate. Letters of administration were forthwith granted to his widow, who undertook the administration, and by her accounts returned, it appears that she proceeded to pay off the debts of the deceased. And it nowhere appears that the administratrix left a single debt of the deceased unpaid at her death, unless the claim of *Riston* were such a debt. And such indeed was the fact, not a single debt remaining unsatisfied, for which the estate was liable. The widow then, became entitled to one-third of all the personal property, in her own right, and the three other mortgagors to their parts, as children of the deceased. She being the administratrix, and widow, and they the children, unite in conveying all the property to which they are entitled, to *Riston*, to secure a note, drawn and endorsed by the whole four, and he holds the property thus conveyed; and now the administrator, *de bonis non*, without shewing that there is a single outstanding debt due by the deceased, claims and

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replevies property, thus conveyed by the former administrator.

We are here in a Court of Law, and not in a Court of Equity, endeavoring to fix a trust on the purchaser, as was the case of *Hill vs. Simpson*, 7 *Vesey, jr.*, cited by Mr. Scott, and we are to be governed by the rules of law.

Now what is the rule applicable to this case? It is this. An executor or administrator can sell or convey all the personal property of the deceased, whenever and wherever he pleases; and although it be a *devastavit* in him, yet this does not affect the sale. He may even give the property away. See *Went. off. of Executors*, 295, 297. 1 *At. Reports*, 463. *St. Andrew's Church vs. Tompkins*, 7 *Johns. Ch. Reports*, 16. *Noy*, 106. *Cro. Jac.* 318. *Coventry's Powell on Mortgages*, 101. *Toller*, 134. *Lord Hardwicke* says, in 1 *Atk.* 463: at law the executor has the power to alien or dispose of the assets of the testator, and no creditor at law can follow them. And Chancellor *Kent*, in 7 *Johns. Ch. Rep.* 16, states distinctly, that an executor has the right to transfer the assets of the deceased, to indemnify one of his own securities, not for him, as administrator, but in a different right.

In some cases in Chancery, the assets may be followed in the hands of the vendee, but they are extremely rare, and they all proceed upon the ground of implied trusts, with which this Court, as a Court of Law, has nothing to do. And this is the case in 7 *Vesey*, and which of course has no application to this case.

The case in 7 *Harr. and Johns.* 17, only decides that an executor does not, by paying the debts of the testator, become entitled to the property of the deceased. It does not at all profess to determine, that an executor cannot convey, by deed or otherwise, the assets of a testator; but this case leaves the law, as to the executor's power to sell, just where it found it. Suppose, however, I should be wrong on this point, still, as it appears, that when this conveyance was executed, that testator had been dead eight

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years, and administration been granted for the same length of time, and it nowhere appears that there is a single outstanding debt; it follows that the widow was actually the owner of one-third of all the personal chattels, and the other grantors, *Eliza*, *William* and *John*, entitled to three-eighths of the residue. By Mrs. *Wyse's* account, it appears that on the payment of the debts, there was yet property to the amount of \$5712 34; one-third of this is \$1904 11; three-eighths of \$3808 23 is \$1428 09, making a total of \$3332 20. Now it appears that the whole personal property in *Riston's* hands, only amounted to \$2293, more than \$1000 less than the grantors were entitled to. Will this Court then deprive the vendee of property thus conveyed, evidently less in value than it manifestly appears they were entitled to, from the estate of the deceased? Taking then Mrs. *Wyse* as administratrix of the deceased, or considering her and her three children as distributees, entitled to a portion of the estate, they were clearly entitled to convey the property in question to *Riston*; and if the children or creditors of *William Wyse*, deceased, have any right to this property, it can only be in equity, where they can resort for redress.

STEPHEN, J. delivered the opinion of the Court.

In this case the plaintiff, as administrator *de bonis non* of *William Wyse*, instituted an action of replevin against the defendant, to recover certain property, out of his possession, which he claimed in his representative character, as part of the assets of said *Wyse*. In 1814, *William Wyse* died intestate as to his personal estate; letters of administration were granted to his widow, who returned an inventory, and settled an account with the Orphans Court of *Baltimore* county, in which she craved an allowance for sundry payments and disbursements, amounting to the sum of \$1292 91. This account was settled on the 29th of June, 1816. The deed of mortgage under which the defendant claims

title to the property, was dated on the 16th of May, 1822, executed by the widow and administratrix, and three of the representatives. Nearly six years had elapsed between the account settled with the Orphans Court, and the execution of the deed of mortgage. The question principally argued in this case, was, as to the power of an executor or administrator, to dispose of the assets of his testator or intestate, in satisfaction of his own debts. The mortgage was given as collateral security, for the payment of a note of hand drawn and endorsed by the mortgagors, payable to the defendant. According to the authorities, it seems that at law, an executor or administrator may transfer the assets of the deceased, in satisfaction of his own debts. *Toller on Executors*, 256, 257, says, he has power to sell, or as it has been held, to mortgage terms of years, or assign mortgaged terms, and to dispose of any of the effects; although as it seems specifically given by the will, and even in satisfaction of his own private debt. Nor when he has aliened the assets, can a creditor follow them at law; for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets. Equity will, indeed, follow assets on voluntary alienations, by collusion with the executor; but if the alienation or pledge be for a valuable consideration, unless fraud be proved, neither law nor equity will defeat it: for a purchaser from an executor has no means of knowing the debts of the testator; and if a Court of Equity, on the subsequent appearance of debts, would control such purchaser, all dealings with executors, would be dangerous; and even in equity, Chancellor *Kent*, in referring to the case of *Nugent vs. Gifford*, 1 *Atkins*, 463, in 7 *Johns. Chan. Rep.* 17, says an assignment of a mortgage term (and it was a mortgage to trustees, in trust for the testator) was made by the executor to the plaintiff, in satisfaction of a debt due from the executor to the plaintiff. Yet *Lord Hardwicke* held the assignment to be valid, and that the creditors of the testator

were not entitled to follow the property. A purchaser from an executor has no power of knowing the debts of the testator; and if he did know it was testamentary assets, it would not affect the validity of the assignment, as it was an alienation for a valuable consideration; and no fraud or collusion with the executor to misapply the assets, appeared. The doctrine in that case has been repeatedly advanced; and it appears to be an established principle, both at law, and in equity, that a bare act of sale of the assets by the executor, is a sufficient indemnity to the purchaser, if there be no collusion. In the case of *Whale vs. Sir Ch. Booth*, *Lord Mansfield* observed, that if at the time of the alienation, the purchaser knew they were assets, this was no evidence of fraud; for all the testator's debts may have been already satisfied: or, if he knew that the debts were not already satisfied, must he look to the application of the money? no one would buy on those terms. There is one exception, indeed, where a contrivance appears between a purchaser and an executor, to make a *devastavit*. In *7 Johns. Chan. Rep. 157*, Chancellor *Kent* says, "subsequent decisions, have, in some degree, restrained the extent of the doctrine laid down by *Lord Hardwicke*, and *Lord Mansfield*. In *Bonney vs. Ridgard*, *1 Cox, 144*, *Lord Kenyon*, the Master of the Rolls, admitted, that in general the purchaser from the executors of the testator's assets was not bound to see to the application of the money; but, that if upon the face of the assignment of the property, it appeared to have been made in satisfaction of a private debt of the executor, the sale was fraudulent against the persons interested, under the will, and equity would relieve. It would be a case of implied fraud." So again in *Scott vs. Tyler, Dickens, 712*, *Lord Thurlow* held, that where an executrix pledged bonds, specifically, as a security for her own debt, contracted after the testator's death, the pawnee must deliver up the bond, for the benefit of the specific legatee. He admitted, that in general the purchaser of the assets had no concern with the application of the price, and that the rule applied equally

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to mortgages, bonds and leases. But if one concerted with the executor to obtain the effects at a nominal price, or at a fraudulent under value, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, the purchaser or pawnee will be liable. In *Hill vs. Simpson*, 7 Vesey, jr. 152, Sir William Grant made a similar decree. He said, the assets *known to be such*, ought not to be applied in any case, for the discharge of the executor's debt, unless the creditor taking the assets can be first satisfied of his right so to apply them. Lord Eldon has also declared, "that there could not be a stronger case of a *devastavit* than an executor aliening the property of the testator, to pay his own debts, the alienee knowing at the time that debts of the testator were due. In the case now before this Court, it nowhere appears that there were any debts remaining due and unpaid at the time of the mortgage; or if they were, that the defendant knew of them, and to use the language of Mr. Justice Ashhurst, to be found in 4 Term. Rep. 645: "if the creditors will lie by and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied." But in this case, it does not appear that the administratrix acted in her representative character at the time she executed the deed of mortgage: she does not, in terms, assume that character, and has associated herself in making the disposition of the property, with three of the children and representatives of her intestate: from this fact, connected with the strong circumstances existing in the case to induce a presumption that the debts were all satisfied, it is fair to infer that she had made distribution of the remaining assets, and acted in her character of distributee. And upon this view of the case, it follows that the appellant, the administrator *de bonis non*, is not entitled to recover.

As to the question raised in the cause, relative to the admissibility of the plaintiff's own inventory to support his case, made after the institution of the action, we think the

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same was not competent evidence, because he might become personally liable for the costs of suit.

JUDGMENT AFFIRMED.

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A Testator, after reciting in his will (which was executed in *Germany*) his intention to depart in a few days for *America*, "for the purpose of seeking his fortune," devised as follows: "He declares his deliberate will to be, that in case he should die unmarried in a foreign country, the small *Opeman Cottage*, situate at D, should be retained as heritable property, by his near relation G, the eldest daughter of I, farmer, at D, whom he hereby constitutes his sole heiress. She and her father, however, shall be held to pay to the three daughters of W and D," a certain sum, as a legacy. "To his guardian C, he devises the turf moor at, &c." After this the testator came to *Baltimore*, where he died unmarried, and without issue, leaving personal property. Held that upon the true construction of this will, G was entitled to the whole of the Testator's personal estate; as it was his intention by the words "*sole heiress*," to give her every thing he had, except the property specifically devised, in the event of his dying unmarried in a foreign country.

APPEAL from the Orphans Court of *Baltimore* county.

A petition was filed by the appellees, *Henry Siemer* and *Gesche*, his wife, in the Orphans Court of *Baltimore* County, on the 3d of April, 1827, setting forth, that a certain *John Siemer*, late of *Baltimore* county, deceased, a native of *Germany*, did, when he was about leaving his country for the *United States of America*, execute a will, in the *German* language, which, by the order of that Court, was accepted as the last will and testament of the said *Siemer*, and admitted to be recorded as such in the Register of Wills' office, of said county; a copy of which, (as translated,) the petitioners exhibit as part of their petition. They

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state that *Charles F. Mayer*, (the appellant) had taken out letters of administration on the estate of the said *John Siemer*, who resided and died in the city of *Baltimore*, having never returned after leaving *Germany* as aforesaid, to that country. That said letters of administration, were granted without any knowledge of an existing will: that the administrator had proceeded to execute his trust, and after due notice, all the creditors of the estate had been paid. That several years have elapsed since the granting of administration, and that on the 2d of April, 1827, the said administrator had passed his third account, showing a balance in his hands of about \$1278 42. That after said will was received, and ordered to be recorded, letters of administration, with the will annexed, were issued to said *Mayer*—they allege that *Gesche*, one of the petitioners, is the *Gesche Warneken*, in said will named, she having married the other petitioner, *Henry Siemer*, and they claim, that by virtue of said will, the petitioner, *Gesche*, is the only legatee of said deceased, and as such, entitled to the whole of the residuum of his estate, the time for the payment of which they say has arrived. *Prayer*, that the defendant may be summoned to answer, pass a final account, and that the balance in his hands may be paid over, and delivered to the petitioners, &c.

The will of *John Siemer* referred to in the preceding petition, is dated on the 28th of April, 1801. The testator, after declaring it to be his intention then to make his judicial testament, having (as he says) at that time, in view to depart for *America* in a few days, for the purpose of seeking his fortune. “He declares his deliberate will to be, that in case he should die unmarried in a foreign country, the small *Opeman* Cottage, situate at *Dreye*, should be retained as heritable property, by his near relation *Gesche Warneken*, the eldest daughter of *Johann Warneken*, farmer at *Dreye*, whom he hereby deliberately constitutes his sole heiress; she and her father, however, shall be held to pay to the three daughters of the toll collector, *Wicken Warneken*,

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at *Dreye*, to wit, *Margaret*, *Antrine*, and *Gesche*, five hundred rix dollars in gold. As a legacy to his guardian *Christopher Eggers*, he devises the turf moor, &c."

The answer of the defendant, admits the granting to him of letters of administration, on the estate of said *Siemer*, as alleged, and that he proceeded in the execution of his trust in the manner stated, and that letters of administration, with the will of the said *Siemer* annexed, were subsequently granted him as the petitioners allege—the respondent further admits, that the paper referred to and exhibited by the petitioners, was received by the Orphans Court of *Baltimore* county, as the last will and testament of the said *John Siemer*, and that said *Siemer* pronounced the same as his will, before he left his native country, *Germany*, as stated by the petitioners, and that said *Siemer*, after so making his will, and leaving *Germany*, never returned, and that he died in the city of *Baltimore*, where he had resided from the time of his arrival in the *United States*, unmarried, and without issue. The respondent further admits, that the *Gesche Warneken*, named in said will, and the *Gesche Siemer*, the petitioner, are one and the same person, and that she is the wife of the petitioner, *Henry Siemer*; but he denies that by virtue of said will, and the terms of any bequest or disposition therein, the said *Gesche Siemer* is entitled to have the funds or property of the deceased, *John Siemer*, exclusively to herself, as universal legatee, and without any participation of the next of kin of the said *Siemer* of equal degree with her; and he insists, that the residue of the personal estate of the said *Siemer*, in his hands remaining, (all the debts being admitted to be paid) ought to be distributed in equal shares among the four *cousins* of the said deceased, who are his next of kin (named in the answer,) and of whom the petitioner, *Gesche*, is one. He further says, that he has rendered to the said Court, a final account of his administration, with the will annexed, by which, a balance is shown to be in his hands of \$1268 16. It was admitted that the persons mentioned in

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the answer as to the next of kin of the said *John Siemer*, in equal degree with the petitioner, are so the next of kin in equal degree.

A commission was sent to *Germany* to take proof, but as the opinion of the Court of Appeals turned entirely upon the construction of the will of *Siemer*, it is not necessary to set out the proof taken and returned under it.

The *Orphans Court*, on the 21st of May, 1827, decreed that the defendant, *Charles F. Mayer*, administrator as aforesaid of *John Siemer*, deceased, pay over to the petitioners in this cause, the balance remaining in his hands due the estate of said deceased, as appears by his last account rendered to this court.

From this decree, the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

Mayer, for the appellant, insisted,

1. That under the proper construction of the will, *Gesche Siemer* is entitled only to the property (the Cottage,) there specifically devised. 2. That even if the terms of the will, purported to give her the personal estate in question, yet that the will not being executed, agreeably to our laws, cannot be considered effectual for that purpose; the personal estate being here, and this having been the country of the deceased *Siemer's* residence at his death. Upon the first point he referred to 4 *Bac. Ab.* 254, 258. *Pratt's Lessee, vs. Flamer, et. al.* 5 *Harr. and Johns.* 10. *Dallam vs. Dallam*, 7 *Harr. and Johns.* 222. 4 *Bac. Ab.* 323. *Halloway vs. Halloway*, 5 *Ves.* 399. 4 *Bac. Ab.* 350. On the 2d point he cited, *Desebats vs. Berquier*, 1 *Binney*, 336. *Sill vs. Worswick*, 1 *H. Blk.* 690. *De Sobry ex'r. of Terrier De Laistre vs. Terrier De Laistre*, 2 *Harr. and Johns.* 191, 200. *Harvey vs. Richards*, 1 *Mason*, 403, 412. *Dixon's ex'rs, vs. Ramsay's ex'rs* 3 *Cranch*, 319. *Marsh vs. Hutch-*

inson, 2 Bos. and Pull. 226. Amb. 25. Ib. 415. Holmes vs. Remsen, 4 Johns. Ch. Rep. 478. Act of 1810, ch. 34.

Frick, for the appellee. Personal property has no locality, but follows the person of the owner, and is to be distributed according to the laws of the domicile of the deceased. The will has been admitted to probate in the Orphans Court of *Baltimore* county, and is in conformity with the laws of *Germany*, and this State. 2 Black. Com. 501. 2 Com. Rep. 452, 453, 454. *Tilghman vs. Steuart*, 4 Harr. and Johns. 166, 173. *Matthews vs. Warner*, 4 Ves. 197, 201. *Beauchamp vs. Earl of Hardwicke*, 5 Ves. 285. It is immaterial where the will was made, it will operate here. The testator intended to constitute *Gesche Warneken*, sole heiress of all his real and personal property, not given to others. When the meaning of the term “sole heiress,” as understood in *Germany* is ascertained, the Court will apply it here. In the *German* language the word “legatee” is not known, and this will was written in the *German* language. We have a right to refer to the civil law, to ascertain the meaning of the term “sole heiress,” in the *German* language. 4 Bac. Ab. 242, 339, 337. *Attorney General vs. Buller*, 5 Ves. 339. *Hays on ad'rs*. 217. *Doe vs. Lyde*, 1 Term Rep. 597. Although the testator died here, it is not shown that this State was his domicile. The will shows he intended to return. *Guier vs. O'Daniel*, (note) 1 Binney, 351. *Babtiste, et. al. vs. De Volunbrun*, 5 Harr. and Johns. 86. *Somerville vs. Lord Somerville*, 5 Ves. 787.

BUCHANAN, Ch. J. delivered the opinion of the Court.

The only question in this case arises upon the construction of the will of *John Siemer*, deceased, admitted to probate and recorded in the Orphans Court of *Baltimore* county.

And that question is, whether by the terms of the will, *Gesche Warneken*, the person therein named, now *Gesche Siemer*, on the death of the testator in this State, unmarried and without issue, (which is admitted,) became en-

titled as residuary legatee, to the whole of his personal property left by him in this State, at his death, after the payment of his debts, and the charges and expenses incident to the administration. The testator, after reciting in his will, (which was executed in *Germany*,) his intention to depart in a few days for *America*, for the purpose of seeking his fortune, devises, in the event of his dying unmarried in a foreign country, a small cottage by name, to *Gesche Warneken*, whom he constitutes in terms "his sole heiress;" and after directing the payment by her and her father, of a sum of money bequeathed as a legacy to others named in the will, devises the turf moor belonging to his place, to *Christopher Eggers*.

The will having been admitted to probate and record, without appeal, and there being no question presented by the record in this case upon that subject, the only inquiry to which our attention is called, is, what was the intention of the testator, in the use of the terms "sole heiress;" and whether the terms used, are such, as to be sufficient to effectuate that intention, that being the only matter involved in the decision appealed from. Thus restricted, the whole case lies within a very narrow compass.

There is nothing to show, that the testator owned any property any where, other than that disposed of in his will, at the time of making it; and looking to the circumstances under which the will was made, would lead to the conclusion, that he had no other, and made his will, with a view of guarding against casualties, and of securing all he had, to those for whom he felt the most lively interest, and from whom he was soon to part.

The will informs us, that in a few days he was about to leave his "native country," for a foreign and a distant land, for the purpose of seeking his fortune; and when, at such a juncture, he deemed it necessary to make a will at all, it is not to be presumed that he would have left behind him any of his property undisposed of; and if he did make an eventual disposition of all he had at that time, (and there is no-

thing appearing to the contrary,) the provision in his will, constituting *Gesche Warneken* his "sole heiress," was perfectly nugatory, unless he had an eye to future acquisitions, which he intended for her benefit, "in case he should (in the language of the will) die unmarried in a foreign country;" and the introduction of that condition in his will, of his dying unmarried in a *foreign country*, shows that he looked to acquisitions in a foreign country, which he intended should go to her, in the event of his dying abroad and unmarried; if, by his will, he did dispose of all the property he had at that time in *Germany*, otherwise, in no event, could there have been any thing for the provision constituting her his "sole heiress," to operate upon. Nothing in *Germany*, all he had there, being already disposed of; and if he married, or returned to *Germany*, and did not die in a foreign country, she was to take nothing under the will. Yet he certainly did intend, that provision should operate upon something, in the event of his dying abroad and unmarried; and the will, reciting that he was about to depart for *America*, for the purpose of seeking his fortune, instructs us, that he calculated on acquiring property here. But it is not material, in the construction of the will, whether the testator had, or had not any other property at the time, than that mentioned in it. He could not have intended to apply the provision constituting *Gesche Warneken* "his sole heiress," to that which had before been given to her, nor to that which was given to another; but must have intended it to operate upon what was not otherwise disposed of. The occasion of his making his will, and the very terms of it sufficiently show, that he meant to dispose of the whole of his property of whatsoever kind it might be, and did not intend to die intestate of any part of it, whether in *Germany*, or acquired in a foreign country, for which he was about to depart to seek his fortune; and there is nothing to raise the slightest supposition, that he had not acquisitions made abroad, equally in contemplation with any property in *Germany*. He was going from his country and

his friends, and made his will, with a view of providing for the contingency of his dying among strangers, which shows that he meant to leave nothing undisposed of; and that with the emphatic terms used, "sole heiress," evinces the intention, that *Gesche Warneken*, who seems to have been the peculiar object of his bounty, should take whatsoever he might leave, and not otherwise disposed of by his will, in the specified event of his dying unmarried in a foreign country; and we think the terms used, by which the intention is manifested, are sufficient to effectuate that intention, and to entitle *Gesche Warneken* to the whole of the personal property left at his death in this State, after the payment of his debts, and other proper charges. Not indeed as heiress, for taking under the will, she could not, if it was real property to be affected by it, take in that capacity, but by purchase, as a legatee. The constituting her "sole heiress," being in effect, to give her every thing he had; and in relation to personal property, equivalent to a bequest of all he possessed. It is an expression of his will, that she should have the whole of his estate in the event specified, in any capacity in which she could take it, either as devisee or legatee: as much so, as if he had said my will is, *Gesche Warneken* shall take, (or have) the whole of my estate, in case I should die unmarried in a foreign country, which would clearly carry the property in controversy, there being no set form of words necessary; and it is enough if the words used sufficiently manifested the meaning and will of the testator.

DECREE AFFIRMED.

Kemp vs. The Baltimore Fire Insurance Company.—1830.

KEMP vs. THE BALTIMORE FIRE INSURANCE COMPANY,
June, 1830.

An Insurance Company having elected to rebuild a mill destroyed by fire, which they were bound to complete within a reasonable time, contracted with S on the 15th October, 1824, who agreed to rebuild and complete it on or before the 1st June next thereafter, for which he was to be paid “\$800 in hand, and \$1000 on the 1st December next, continuing as the work progressed, the payment of \$1000 on the first day of each following month, until the 1st July inclusive, provided the work shall then be finished.” On the 16th December, 1824, S drew an order on the Company in favor of the Millwright, which authorised the Company to retain \$750 *out of the last payment* to be made to him, and to pay it over to the Millwright, as soon “as he is completely finished, agreeably to his contract.” This order was accepted by the Company. In an action by the Millwright upon the order, it appeared that he had finished his part of the work according to his contract with S—that the owners of the mill were satisfied with the character of his work—that the mill, however, was not finished until January, 1826—that the Company retained the last \$1000, which they were to pay S, to answer a suit which the proprietors of the mill had brought against them, for an alleged violation of S’s contract. HELD, that upon the true construction of the order, the plaintiff was entitled to receive the \$750 from the Company, only in the event of S becoming entitled to his last instalment, out of which it was to be paid—and that although time is not generally considered to enter into the essence of a contract; yet, in this case, it ought to have that effect, by reason of the Company’s liability to the assured to rebuild in a reasonable time.

In an action against a corporation, the affidavit of the president thereof made for the purpose of procuring a continuance, in another cause than that in which it was offered as evidence, is not competent testimony against such corporation, though the subject matter of the affidavit be pertinent to the issue. He should be sworn as a witness, the defendant being entitled to a cross examination.

APPEAL from *Baltimore County Court.*

Assumpsit, by the appellant, against the appellees, on an accepted order, drawn by a certain *David Scott*, on the appellees, and dated December 16th, 1824. The declaration contained a special *count* on the order, the money *counts*, a *count* for work and labor, and on an *insimul computasent*. The defendants pleaded *non assumpsit*, and issue was joined.

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1. At the trial, the plaintiff offered in evidence to the jury the following order of *David Scott* upon the said Company, and also the acceptance of the same by *David Williamson*, who was at the time, and still is, the President of the said Company. “*Frederick County, Dec. 16th, 1824. Sir, Agreeable to an article entered into this day, by Daniel Kemp, to do the millwright’s work of Walter B. Kemp’s mill on the Monocacy, I do hereby authorise you to retain seven hundred and fifty dollars out of the last payment to be made to me, and to pay it over to said Kemp as soon as he is completely finished, agreeable to his contract, and charge the same to account of your humble servant, David Scott. To David Williamson, Esq. President of the Baltimore Fire Insurance Company. Accepted. D. Williamson, Prest. 23d December, 1824.*” The plaintiff further offered in evidence, the policy of insurance between the defendants and the owners of the said mill, by which the same was insured against loss from fire, and which secured to the defendants, the right of reinstatement, in preference to payment, if the former should be deemed most expedient by the Company. And also offered in evidence, the following agreement: “*Memorandum of an agreement made this 15th of October, 1824, by, and between the President and Directors of the Baltimore Fire Insurance Company of the one part, and David Scott, of Frederick county, of the other part, witnesseth: That the said David, hath agreed to rebuild the Monocacy mill, and replace all the machinery which was in the said mill, agreeably to the description given by Mr. John Davies, in his letters of the 9th June, 1823, and 13th October, 1824, and a plot presented at the office of said Company, this day; the said mill having been insured in this office, for Walter B. Kemp, and to complete the same, on or before the first day of June next, for, and in consideration of the aforesaid, the Insurance Company promise to pay the said Scott, eight hundred dollars in hand, and one thousand dollars on the first day of December next, continuing as the work progresses, the payment*

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of one thousand dollars, on the first day of each following month, until the first of July inclusive; provided, the work shall then be finished. *D. Williamson, President. David Scott.* The above to serve, until a more full detail and contract shall be executed, and security given by the said *Scott*." He also offered in evidence to the jury, the following letters: "To the President and Directors of the *Baltimore Fire Insurance Company*. Gentlemen: Mr. *Buckey* has left with me, for adjustment, a claim against your office, to a considerable amount, for a loss on a mill on the *Monocacy*. Will you be so good as to inform me if it can be adjusted otherwise than by suit. Very respectfully, *John Glenn. Baltimore, Feb. 25th, 1826.*" "Mr. *John Glenn, Sir: We* have received your note as attorney for Mr. *Buckey*, wherein you state he has a claim on this office. He was in town about two weeks since, and did not exhibit any account of what he claimed from the Company. They have fulfilled their engagement, by rebuilding a new mill several thousand dollars better than the old one, which can be proved. By order, *Henry W. Webster, Sec'ry. Baltimore, Feb. 28th, 1826.*" And also proved by *Webster*, secretary of the defendants, that he was such, and that by a *parol* order of the board, he had addressed the said letter to *John Glenn*, esquire. And that the mill mentioned in said letter, was the same referred to, in the order drawn by *Scott* upon the defendants. The plaintiff also proved that he had completed his portion of the work, according to the terms of his contract with *Scott*, and that *Scott* had received the said work, and expressed himself satisfied therewith. And that the defendants had paid *Scott* all the payments to which he was entitled under his contract, for rebuilding said mill, except the last payment, amounting to one thousand dollars, which sum remained with, and still is retained by the defendants, because of an alleged non-compliance, made by the persons entitled to said policy of insurance, by *David Scott*, with his said contract with the Company; and on account of which, a suit is now pending in this Court on

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said policy, against the defendants. And that the mill was built by *Scott*, and in a workmanlike and proper manner; that the same had been burnt down in August, 1824, but was not rebuilt and finished, until 1st January, 1826, on which day, the proprietors took possession thereof, and afterwards gave the following note, signed by *Christian Kemp* and *Daniel Buckey*, "15th January, 1826. *George Baer*, Esquire. You can state to *David Williamson*, Esquire, President of the *Baltimore Fire Insurance Company*, that we were called on by *Daniel Kemp*, millwright, who has done the millwright's work to the mills called *Monocacy* mills, which *David Scott* had undertaken to rebuild for the *Baltimore Fire Insurance Company*. We are satisfied with the workmanship of *Daniel Kemp*. We have taken the mill off his hands, as to the workmanship." After the foregoing evidence had been given to the jury, the plaintiff offered in evidence, legal proof of the pendency of a suit in *Baltimore County Court*, wherein *Walter B. Kemp*, (for the use of *Christian Kemp* and *Daniel Buckey*,) was plaintiff, and the said *Baltimore Fire Insurance Company*, defendants; and that on the 26th November, 1827, said defendants applied for the continuance of said suit, and for the purpose of procuring the same, the said *Williamson*, as President aforesaid, made in open Court the following affidavit: "*Kemp vs. The Baltimore Fire Insurance Company*. *Baltimore County Court*, September Term, 1827. *David Williamson*, the President of the *Baltimore Fire Insurance Company*, the defendants in this cause, makes oath in open Court, that the defendants cannot proceed to the trial of the cause at this time, for the want of evidence material, competent, and proper; that *William Durham* and *David Scott*, are material, competent, and proper witnesses, for the defendants in the said case, and that the Company expect to prove by said witnesses, that the mill in the policy of insurance mentioned, upon which the action is brought, was, after the de-

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struction thereof, rebuilt by said Company, under the provisions of the memorandum, at the foot of said policy, within a reasonable time, and was as good when rebuilt, as the mill burnt was originally when insured, &c.;" which said affidavit, the plaintiff offered to read in evidence (the said *Williamson* being then present in Court) to the jury, in order to shew to the jury, that the mill had been rebuilt, and to use the said affidavit as an admission thereof. To the reading of which affidavit to the jury, as evidence of the fact, that the conditions stated in the accepted order of *Scott*, upon defendants, and upon which, as appears upon the face of said order, it was accepted as aforesaid, by said *Williamson* as President, had been complied with, the defendants objected, and the Court being of opinion, that the same was not evidence for the purpose aforesaid, rejected the same, the plaintiff excepted.

The defendants then upon the whole of the evidence above stated, as given to the jury, prayed the Court, to direct the jury, that the said evidence was not sufficient to prove, that the conditions upon which the aforesaid order had been given and accepted, had been complied with, and that the plaintiff was not entitled to recover; which direction, the Court gave. The plaintiff excepted, and the verdict and judgment being against him, he appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and STEPHEN, J.

Frick, for the appellee, contended,

1. That there was legal, admissible evidence offered to the jury, from which they could have inferred and determined, that the condition on which the order upon the President of said Company was given and accepted, had been complied with, and that the Court erred in their absolute direction to the jury, that the said evidence was insufficient for that purpose. 2. That the affidavit of *David Williamson*, the President of the Company, was legal, admissible testimony, for the purpose aforesaid. On the first point he

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cited *Morris vs. Brickley and Caldwell*, 1 *Harr. and Gill*, 107. *Davis vs. Davis*, 7 *Harr. and Johns*. 38, 39. *Elder vs. Warfield*, *Ib.* 394, 417. *Laidlow vs. Organ*, 2 *Wheat*. 178. *Cathell vs. Goodwin*, 1 *Harr. and Gill*, 470. *Wright vs. Freeman*, 5 *Harr. and Johns*. 478. *Ferguson vs. Tucker*, 2 *Harr. and Gill*, 189. *Burt vs. Gwinn*, 4 *Harr. and Johns*. 516. *Alston vs. Contee*, *Ib.* 351. 1 *Stark. Ev.* 398, 399. *Etting vs. Bank U. S.* 11 *Wheat*. 75. 1 *Stark. Ev.* 429. *McLanahan vs. Universal Ins. Co.* 1 *Peters' S. C. Rep.* 170, 171. *Thornton vs. Wynn*, 12 *Wheat*. 183.

Johnson, for the appellees. The question here is upon the contract set out in the first count in the declaration, and the construction of that contract is for the Court. *Ferris vs. Walsh*, 5 *Harr. and Johns*. 306. The order of December 16th, 1824, creates an obligation to pay only upon the condition that *Scott* should be entitled to demand the last instalment. At the time the order was drawn and accepted, that instalment had not become due. By *Scott's* contract with the defendants, the mill was to be completed in July, 1825, and the last instalment was to be paid only in the event of his fulfilment of that part of his contract. It was not finished until January, 1826, and therefore, the last instalment did not become payable. There is no evidence that the defendants ever discharged *Scott* from the terms of the contract.

That the affidavit of *Williamson* was not evidence, he referred to *Bateman vs. City Bank*, 7 *Harr. and Johns*. 104.

STEPHEN, J. delivered the opinion of the Court.

The facts of this case, and the questions therein involved, lie within a very narrow compass. They are as follows: (here the Judge stated the facts in the bills of exceptions,) and then said, the principal question in the case arises upon the true construction of *Scott's* order upon the Company, in favor of *Daniel Kemp*. By the terms

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of his contract with the Company, *Scott* was bound to rebuild the mill by the first of June, 1825, and it was proved in the cause, that it was not rebuilt until the first of January, 1826. The mill was burnt down in August, 1824. The Company having elected to rebuild the mill, were bound to do it in a reasonable time. *Scott* contracted on the 15th of October, to rebuild it by the 1st of June, 1825, and his last payment was to be made *upon that condition*; and although time is not generally considered to enter into the essence of a contract, yet in this case, we think it ought to have that effect, by reason of the Company's liability to the assured, to rebuild in a reasonable time; and for the non-performance of which, it appears, that a suit had been commenced against them. We think, that upon the true construction of the order, *Daniel Kemp* was entitled to receive the \$750 from the Company, only in the event of *Scott's* becoming entitled to receive his last instalment of \$1000, out of which it was to be paid, upon complying with the terms of his contract, to rebuild the mill by the 1st of June, 1825. We are furthermore of opinion, that the affidavit of *David Williamson*, was properly rejected, as he was present in Court at the time, and ought to have been sworn as a witness, the defendants in the cause being entitled to a cross examination.

JUDGMENT AFFIRMED.

JACOB SHILKNECHT, *et al.* LESSEE, vs. EASTBURN'S
HEIRS.—*June*, 1830.

To give a deed legal effect and operation, as a deed under a decree of the Court of Chancery, a copy of the record ought to be produced, to show the trust reposed in the grantor, and his legal performance of it.

Although a deed cannot have legal operation as a deed under a decree of Chancery, without producing the record, yet it shall be taken most

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strongly against the grantor ; and such legal interest as he had, capable of being transferred, may pass thereby.

In 1752, a patent was granted for a tract of land called P, containing 50 acres. In 1754, another patent was granted for a tract called *Resurvey of P*, containing 375 acres. They were issued to the same grantee ; and in 1791, his heirs conveyed a tract called P, containing 375 acres, to certain persons, their heirs and assigns in trust. In an action of Ejectment for a tract of land called the *Resurvey of P*, the lessor of the plaintiffs claimed title from the surviving trustee, under a deed for a part of the last mentioned tract, which described the part conveyed by metes and bounds, and professed to be executed in pursuance of a decree in Chancery. No decree was produced, nor any evidence that the aforesaid tracts of land were the same, in fact, but called by different names. HELD, That the deed of 1791 could only convey to its grantees, the trustees, the tract P, according to its original lines, metes, and bounds, and that they could transfer no title to land claimed in this action.

A location of a tract of land by one party in Ejectment, not counterlocated by the other, is admitted to be correct ; that is, that the land is correctly described on the plots ; but it does not admit the title to the land.

To recover in Ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land by location, and also that he has a legal right to the land thus located.

The law is well established, that facts to aid a title may, in some cases, be presumed.

The law will always lean to the presumption that a trustee has faithfully executed his trust.

Every fair legal presumption ought to be allowed in favor of a judicial sale, where the purchase money has been *bona fide* paid.

A trustee in the year 1795, under a decree of the Court of Chancery, sold certain real estate, and returned a report of the sale and proceedings, upon which the Chancellor passed the usual order of confirmation *nisi*. In 1803, the trustee executed a deed to the purchaser, which recited the sale, its ratification, and the payment of the purchase money. It did not appear from the record of the proceedings in Chancery, that the sale had been *finally* ratified. The deed of the trustee being relied upon as evidence of title in the year 1826, HELD, That the jury might, and ought, to presume that the return of the sale, as reported by the trustee, had been finally ratified and confirmed.

APPEAL from *Frederick* County Court.

Ejectment for a tract of land called the *Resurvey on Panmure*, lying in *Frederick* county. The declaration contained counts on the joint and separate demises of the lessors to the plaintiff, on the 2d of January, 1812, for

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twenty years. The defendant, *Robinson Eastburn*, whose heirs at law the appellees are, appeared after his death, and entered into the common rule, and took defence on warrants, and pleaded not guilty, to which issue was joined. A warrant of resurvey was issued, and plots were returned, with sundry depositions of witnesses taken on the survey.

1. At the trial, the plaintiff gave in evidence to the jury, the plots and explanations filed in this cause; also the patent for the tract of land called *Panmure*, granted to *John Cary* on the 30th of November, 1752, for 50 acres; also the patent for the tract of land mentioned in the declaration, called *The Resurvey on Panmure*, granted to *John Cary* on the 4th of July, 1754, for 375 acres. The plaintiff also proved, that *John Cary*, the patentee of the tract of land called *Panmure*, and also the patentee of the tract of land called *The Resurvey on Panmure*, was dead, leaving *John D. Cary*, *Robert T. Cary*, *William Cary* and *Elizabeth Cary*, as his only children and heirs at law; that *Elizabeth Cary*, as his only children and heirs at law; that *Elizabeth* died without issue. The plaintiff further gave in evidence a deed from the said *John D.*, *William* and *Robert T. Cary*, to *Jacob Young* and *George French*, executed after the death of the said *John Cary*, the patentee of the said land, and also executed after the death of the said *Elizabeth*, dated the 8th of August, 1791, whereby they conveyed “to the said *George French* and *Jacob Young*, their heirs and assigns, the three following tracts or parcels of land: *Zero*, containing 53 acres, *Panmure*, containing 375 acres, and part of *Palentine*, containing 178 acres; all lying between *Catoctin* and *South* mountains in *Frederick* county aforesaid, reference being had to the said patents and deeds will more fully appear.” In trust that the said *French* and *Young* “and their heirs, shall dispose of the fee simple in the said three tracts or parcels of land, in convenient time, for the best price that they can obtain, and within a reasonable time after the disposal thereof, divide the monies therefrom arising among the said *William Cary* and *Robert T. Cary*, and the creditors of *John Dow Cary*, first satisfy-

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ing judgment creditors, as to them the said *George French* and *Jacob Young* shall seem just and equitable, so that the said *John D.*, *William* and *Robert T.*, shall each bear a proportion of the balance due on a judgment of *Cornelius* and *John Thompson* and *Ann M'Donald*, complainants, and *Mary*, *John D.*, *William* and *Robert T. Cary*, defendants, for which a proceeding is now in Chancery against them; and that the said *John D.* and *William* may be reimbursed so much as they may have satisfied of the said debt more than their equal proportion." Covenant by *French* and *Young*, that they and their heirs will, within a convenient time, dispose of the said three tracts of land for the best price, &c. Covenant by *John D. Cary*, &c. with *French* and *Young*, their heirs, &c. against the claim of all and every persons, &c. The plaintiff also gave in evidence a deed from *Jacob Young* to *George Scott*, dated the 28th of July, 1803, reciting that the said *Young* and *George French*, (deceased) "were appointed by the Court of Chancery trustees for the sale of real estate of *John*, *Robert* and *William Cary*, as will more fully appear by reference to the decree of the said Court, directing the said sale; and the said trustees did expose to sale the said real estate, according to the terms of the said decree, at which said sale the said *George Scott* did become the purchaser of lots No. 1, 2 and 5, (as will be more particularly described) part of the said real estate, at and for the price of £727 2 4½ in the whole, which said purchase money the said *George Scott* has paid; and the said sale, made by the said trustees, has been confirmed by the Chancellor; and the said *George French* is now dead." The said *Young*, in virtue of the said decree, &c. did convey to the said *George Scott*, his heirs and assigns for ever, "all those parts of the following lands, lying in *Frederick* county, to wit: Lot number one, being part of *The Resurvey on Panmure*, beginning," &c. containing 115½ acres; "also lot number two, being part of *The Resurvey on Panmure*, beginning," &c. containing 139½

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acres; also lot number five, being part of the *Resurvey on Panmure* and *Zero*, beginning," &c. containing 43 acres, &c. The plaintiff also offered in evidence, the record and proceedings in a cause between the said *George Scott's* lessee, plaintiff, and *Robinson Eastburn*, defendant, tried in *Frederick County Court*, and judgment therein rendered at February Term, 1808, in favor of the plaintiff, and a writ of *hab. fac. pos.* issued on the said judgment, and possession of the premises delivered to the plaintiff on the 27th of June, 1808. By this record it appears that an action of Ejectment was instituted in *Frederick County Court* on the 17th of February, 1804, in the name of *George Scott's* lessee against *Robinson Eastburn*, for the recovery of a tract or parcel of land called *The Resurvey on Panmure*, containing 375 acres; also a tract of land called *Zero*, containing 53 acres; also a tract of land called *Palentine*, containing 319 acres; also a tract of land called *West Indies*, containing $8\frac{1}{2}$ acres. The defendant in that action appeared and entered into the common rule, and took defence on warrant, &c. A warrant of resurvey issued, and plots were returned, &c. And at the trial the jury by their verdict found the true location of the tract of land called *The Resurvey on Panmure*, as located by the plaintiff on the plots, beginning at I, and running, &c. And the jury found for the plaintiff all the land for which the defendant took defence, included within the above location of *The Resurvey on Panmure*, except so much thereof as was included in the *Ram's Horn*, as located by the defendant in red drawn lines, with three degrees for variation. And as to the residue of the land claimed by the plaintiff, they found for the defendant. Judgment was rendered on the verdict in favor of the plaintiff for possession and costs, &c. On the 3d of May, 1808, a writ of *hab. fac. pos.* issued, and possession delivered to the plaintiff of the land so recovered. The plaintiff also gave in evidence a deed from *George Scott* to *Robert Cheney*, dated the 3d of August, 1809, reciting that *Scott*

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did by his agreement with *William Cheney*, deceased, dated the 31st of May, 1804, and by his bond of conveyance, &c. agree to convey to the said *W. Cheney* certain lands therein mentioned; that *W. Cheney* is since dead intestate, leaving brothers and sisters his heirs at law, of whom the above mentioned *Robert Cheney* is one, who filed his bill in *Frederick County Court*, praying a division or sale of the real estate of the said *William Cheney*, deceased, under the act to direct descents. On which proceeding the said *Robert Cheney* elected to take the said estate at the valuation, and pay to the other heirs their respective proportions in money, which was confirmed by the Court, &c. That the said *Robert Cheney* had received from the heirs of *William Cheney* a general power of attorney to act for them in all things relative to the said estate, as by reference to the said power of attorney, dated the 7th of August, 1806, will appear. The said *George Scott* conveyed to the said *Robert Cheney*, and his heirs, all his the said *Scott's* right, &c. to all those three several tracts or parcels of land, &c. to wit: Lot No. 1, being part of a tract of land called *The Resurvey on Panmure*, beginning, &c. containing 115 acres. Lot No. 2, being part of a tract of a land *The Resurvey on Panmure*, and part of a tract called *West Indies*, beginning, &c. containing $125\frac{1}{4}$ acres. Lot No. 5, being part of a tract of land called *The Resurvey on Panmure*, and part of a tract called *Zero*, beginning, &c. containing $44\frac{1}{4}$ acres. The said three parcels or lots of land said to contain $284\frac{1}{2}$ acres, more or less. The plaintiff also gave in evidence a deed from *Robert Cheney*, attorney in fact for the heirs and legal representatives of *William Cheney*, deceased, to the lessors of the plaintiff, as heirs at law of *Henry Shilknecht*, deceased, as tenants in common, and not as joint tenants, dated the 26th of August, 1809, reciting that *William Cheney*, deceased, in his life-time, agreed to sell and convey to a certain *Stottemyer*, two parcels or tracts of land particularly described in his bond of conveyance, dated the 5th of July, 1804. That *Stottemyer* relinquished his title

to the said tracts of land unto *Henry Shilknecht*; that the said *William Cheney* and *Henry Shilknecht* are both dead, no deed of conveyance of the said lands having been executed. The said *Robert Cheney* conveyed to the lessors of the plaintiff, in consideration of the premises, &c. all those two parts of tracts or parcels of land, viz: Lot No. 1, it being part of a tract of land called *The Resurvey on Panmure*, beginning, &c. containing 115 acres. Also, part of a lot No. 2, being part of the tract of land called *The Resurvey on Panmure*, beginning, &c. containing 6 acres. The deed was signed and sealed by *Robert Cheney*, as attorney in fact for the heirs and legal representatives of *William Cheney*, deceased, and by him acknowledged on the same day before one of the associate judges of the judicial district. Whereupon the defendant, by his counsel, prayed the Court to direct the jury, that the said deed from *Jacob Young* to *George Scott*, under the evidence offered, conveyed no title to the said *Scott*. Which direction the Court (SHRIVER and T. BUCHANAN, A. J.) gave to the jury. The plaintiff excepted.

2. The plaintiff, in addition to the evidence by him offered in the preceding bill of exceptions, gave in evidence the record and proceedings in a case in the Court of Chancery, upon the application of *John D. Cary*, *Robert T. Cary*, *William Cary*, *Jacob Young* and *George French*. This record states, that *John D. Cary* on the 9th of October, 1792, petitioned the Chancellor for the benefit of an insolvent law, passed at November Session, 1791, ch. 73, in which he was included among other petitioning debtors. A list of his creditors was exhibited with his petition to the Chancellor; also a schedule of his property, real, personal, and mixed. The usual and customary proceedings were had. And it appears, that on the 4th of March, 1793, *George Scott* was appointed trustee for the benefit of the creditors of *John D. Cary*; and afterwards, on the 4th of January, 1794, but for what cause does not appear, *George French* was appointed the trustee, who entered into a

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bond as such. On the 14th of January, 1795, *George French*, the trustee, filed a petition by himself, *Jacob Young*, *John D.*, *William* and *Robert T. Cary*, to the Chancellor, stating that the said *French* and *Young* were appointed by the *Cary's* above mentioned, as trustees, by a deed, to sell certain property; but that *French* and *Young* earnestly wishing, for the satisfaction of every person interested, that the Chancellor would direct in what manner and on what terms, the said property should be sold, prayed that the Chancellor would take the same into consideration, and appoint the said *French* and *Young* to sell the property in the deed mentioned, for the purpose therein expressed. The deed was exhibited as herein before referred to, dated the 8th of August, 1791. Also the will of *John Cary*, dated the 23d of November, 1773, whereby he devised, among other things, as follows: "Item. I give and bequeath to my son, *Robert Turner Cary*, all those pieces of land lying on *Catoctin* creek, and on the east side thereof, being part of *Panmure*, and part of *Palatine*, and also part of *Zero*, to him, his heirs and assigns, for ever. Item. I give and bequeath to my son, *David Cary*, all that part of a tract of land called *Panmure*, which lies on the west side of *Catoctin* creek, and also that part of a tract of land called *Zero*, lying on the west side of said creek, to him, his heirs and assigns, for ever." The Chancellor, (HANSON) on the 14th of January, 1795, decreed "that the said *George French* and *Jacob Young* do proceed to sell at public auction, either entire, or in such parcels as they shall judge most convenient, the lands conveyed to them in trust to be sold, by *John D.*, *William* and *Robert T. Cary*, by indenture executed on the 8th of August, 1791, the purchaser or purchasers of each parcel giving bond, with security, to the said trustees, as such, for paying one-half of the purchase money, with interest, within one year, and the residue, with interest, within two years from the time of sale: Provided, that before the trustees proceed to sell, they shall give notice of the time

or times, place or places, manner, and terms of sale, by advertisement inserted three weeks successively in some convenient newspaper, and set up," &c. That they should return to the Court a full and particular account of their proceedings under the decree, with an affidavit of the truth thereof annexed. Also the bonds taken from the purchasers. "And upon the Chancellor's ratification of the sale, and receiving the whole purchase money, and not before, the said trustees, or either of them, by a good deed, shall give, &c. unto the purchaser or purchasers, and his, her or their heirs, the land to him, her or them sold," &c. That the trustees bring the money into Court, to be applied under the directions of the Chancellor, according to the intentions of the said deed of trust, &c. On the 24th of October, 1795, the trustees reported, that after giving three weeks public notice, &c. the said *Jacob Young* on the 3d of March, 1795, exposed to public sale lot No. 1, containing $211\frac{1}{2}$ acres, lying on the west side of *Catoctin* creek, at 40 shillings and 7*d.* per acre, to *Jacob Rhodes*; but *Rhodes* not being able to bond for said lot, &c. the said *Jacob Young* had since sold the said lot to *George Scott*, at the same price for which the said *Scott* had bonded. That the said *Jacob Young* sold at public sale to the said *George Scott*, lots No. 2 and 5, lying on the west side of the said creek, at the price of 44 shillings per acre; lot No. 2, containing $139\frac{1}{2}$ acres, and lot No. 5, containing 43 acres; for both of which lots the said *Scott* had bonded. That the said *Jacob Young* sold at public sale to *Joseph Eller*, lot No. 3, lying on the west side of the said creek, containing 10 acres, at the price of 54 shillings per acre, &c. That the said *Jacob Young* sold at public sale to the said *Eller*, lots No. 4, 6, and 7, lying on the east side of the said creek, at 34 shillings per acre; lot No. 4, containing $97\frac{1}{2}$ acres; lot No. 6, containing 48 acres; and lot No. 7, containing 167 acres. That three weeks public notice was not given of the sale of the lots on the east side of the said creek; but the said *Young* being of opinion that a good

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price might then be obtained for the said lots, although not advertised, according to the directions of the said decree, exposed them to sale, and got the price aforesaid, which in the opinion of the said *George French* and *Jacob Young*, is a very good price. The trustees reported, that the sales of the said lands amounted to £1286 4 4½ current money. To this report was annexed an affidavit of its truth. The trustees also reported a survey, directed by them to be made of the lands directed to be sold, and of its division into seven lots, &c. On the 31st of October, 1795, the Chancellor ordered that the report of *George French* and *Jacob Young*, trustees, &c. be ratified and confirmed, unless cause to the contrary be shown, on or before the third Tuesday in December then next; provided a copy of the order be inserted in the *Fredericktown* newspapers at any time before the last of November. The trustees afterwards filed the following printed extract from a newspaper: “In Chancery, January 8th, 1796.—Ordered, That the report of *George French* and *Jacob Young*, trustees for the sale of the real estate of *John, Robert* and *William Cary*, be approved, and that the sales by them made, as stated in said report, of the property in lots, for £1286 4 4½, in the whole, be ratified and confirmed, unless cause to the contrary be shown, on or before the third Tuesday in March next; provided this order be inserted in the *Fredericktown* newspapers at any time before the 10th of February next.—Test, *Samuel Harvey Howard*, Reg. Cur. Can.” On the 28th of April, 1803, *Ariana French*, executrix of *George French*, filed her petition to the Chancellor, stating that “by a decree, *Jacob Young* and *George French*, deceased, were appointed trustees to sell the real estate of *John D., Robert* and *William Cary*; that the said trustees sold the real estate according to the said decree, and reported to this Court, which report has been ratified and confirmed. That *George French* is since dead, and that she is his executrix. That at the time of the decree, and at the time of executing the deed of trust to the said *Young* and *French*, upon which the decree was

predicated, there were sundry judgments against the said *Cary's*, charging and incumbering the lands deeded in trust and decreed to be sold, which judgments are particularly stated in the amounts of payments and disbursements filed in this Court by the said *Young* as surviving trustee. That *George Scott*, a purchaser of part of the land sold, owes a considerable sum of the purchase money, which, with interest, he is ready to pay to the surviving trustee. That the judgments paid by the trustees were paid in succession according to their priority, and that the next oldest judgment is the one obtained by *Thomas Beall* for the use of *Archibald Orme*, against *John D. Cary* and *George French*, at May Term, 1789, a short copy of which is exhibited. That *George French* was only security for the said *Cary*, and was not principal in the bond upon which the judgment was obtained, the debt being due by *Cary* himself. That the said *French*, in his life-time, and the petitioner, had paid the said judgment, and that the said *Cary*, or his trustees as such, have paid no part thereof. *Prayer*, that as much of the purchase money due for the real estate sold under the said decree, as will satisfy the said judgment, with interest, &c. be paid by the said *Young*, the surviving trustee, to the petitioner, &c.” Proof of the payment, &c. was exhibited. On the 21st of April, 1803, the Chancellor, on the above petition, proof, &c. being “of opinion that the petitioner having discharged the judgment obtained by *Thomas Beall*, for the use of *Archibald Orme*, against *John D. Cary* and *George French*, the said *French* being only a security for said *Cary*, is entitled to be in the place of the said *Orme*.” The plaintiff also gave in evidence, that *David Cary*, mentioned in the will of *John Cary*, the patentee, died in his infancy, intestate, and without issue, long before the deed of the said *John D.*, *Robert T.* and *William Cary*, to *Jacob Young* and *George French*. Whereupon the plaintiff prayed the opinion and direction of the Court to the jury, that from the facts given in evidence in this cause, they may and ought to presume, that the return

of sales, as reported by the trustees in the said proceedings in Chancery, was finally ratified and confirmed by the Chancellor. But the Court (SHRIVER and T. BUCHANAN, A. J.) were divided in their opinion as to the direction prayed for as aforesaid. Wherefore they did not give the opinion and direction prayed for by the plaintiff. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Ross, for the appellant, on the 1st exception, referred to 2 Blk. Com. 308, 309. *Bolton vs. Bishop of Carlisle*, 2 H. Blk. 263, 264. *Doe vs. Bingham*, 6 Serg. and Low. 562. *Roe, ex. dem. Berkely, vs. Archbishop of York*, 6 East. 101. *Shepherd vs. McEver*, 4 Johns. Ch. Rep. 136. *Jackson vs. Neely*, 10 Johns. Rep. 386. *Huntington vs. Havens*, 5 Johns. Ch. Rep. 27. *Run. Eject.* 400, 401, 435. *Jackson vs. Woolsey*, 11 Johns. Rep. 509. *Morris and others, vs. Rosser*, 3 East. 15. *Jackson vs. Schaubert*, 7 Cowen's Rep. 201. On the 2d exception he referred to 3 Stark. Ev. 1235, 1251. *Eldridge vs. Knott*, Cowp. 215. *Hillary vs. Waller*, 12 Ves. 251, 256. 2 Saunders' Law. Ev. 728. *Fenwick vs. Reed*, 7 Serg. and Low. 80, 81. *Donn vs. Lewis*, 11 Ves. 601. *Bank U. S. vs. Dandridge*, 12 Wheat. 69, 70. *Ricard vs. Williams*, 7 Ib. 109, 110.

Nelson, and F. A. Schley, for the appellees, on the 1st exception, cited *Mann and Toles vs. Pearson*, 2 Johns. Rep. 37. *Lodge's Lessee vs. Lee*, 6 Cranch, 237. *Dorsey vs. Hammond*, 1 Harr. and Johns. 193. *Buchanan's Les. vs. Steuart*, 3 Ib. 329. 4 Yeates' Rep. 577. *Barr vs. Gratz*, 4 Wheat. 213, 221. *Penrose vs. Griffith*, 4 Binney, 231. 1 Stark. Ev. 369, (note.) 4 Cruise, 37. 1 Saund. L. Ev. 7. *Barr vs. Gratz*, 4 Wheat. 220. *Barney vs. Patterson*, 6 Harr. and Johns. 203. *Ham. Dig.* 448. On

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the 2d exception, they referred to *Lake vs. De Lambert*, 4 Ves. 592. 1 *Stark. Ev.* 152. 3 *Inst.* 173. *Orndorff vs. Mumma*, 3 *Harr. and Johns.* 70, 71. 4 *Com. Dig. tit. Ev. (A. 4)* 89. 3 *Stark. Ev.* 1251. *Knight vs. Dauler*, *Hard. Rep.* 324. *Cockey vs. Smith*, 3 *Harr. and Johns.* 27. *Sugd.* 32. *Anonymous*, 2 *Ves. Jr.* 335. *Annesley vs. Ashurst*, 3 *P. Wms.* 282, 283. *Ex parte Minor*, 11 *Ves.* 559. *McHen. Eject.* 151, 152. *Goodtitle vs. Duke of Chandos*, 2 *Burr.* 1071, 1076. *Causwell vs. Vaughan*, 2 *Saund. Rep.* 42, a (note.) *Yard vs. Ford*, *Ib.* 175. 3 *Stark. Ev.* 1284, 1285. *Eldridge vs. Knott*, 1 *Cowp.* 215. *Hillary vs. Waller*, 12 *Ves.* 251, 264. 2 *Saund. Ev.* 728. *Ricard vs. Williams*, 7 *Wheat.* 109, 110. *Hopkins vs. Hopkins*, 10 *Johns. Rep.* 380, 381. *Carroll vs. Norwood*, 1 *Harr. and Johns.* 172. 3 *Ib.* 27. *Beall vs. Lynn*, 6 *Harr. and Johns.* 351.

Ross, in reply, cited, on the 1st exception, *Hawkins vs. Hanson*, 1 *Harr. and McHen.* 528. *Dorsey vs. Hammond*, 1 *Harr. and Johns.* 193. *Buchanan's Les. vs. Steuart*, 3 *Ib.* 329, 339. *Lodge's Les. vs. Lee*, 6 *Cranch*, 237. *Roe, ex. dem. Berkely vs. Archbishop of York*, 6 *East.* 105, 106. *Barr vs. Gratz*, 4 *Wheat.* 221. 4 *Yeates' Rep.* 577. 1 *Saund. Ev.* 7, 51. *Hopkins vs. Lee*, 6 *Wheat.* 113. *Chirac vs. Reinecker*, 11 *Wheat.* 296. *Outram vs. Morewood*, 3 *East.* 346. On the 2d to *Anderson vs. Foulke*, 2 *Harr. and Gill*, 353, 356, 357, 359. *Weems vs. Brewer*, *Ib.* 401.

MARTIN, J. delivered the opinion of the Court.

In the argument of this cause, several points have been brought into view by the counsel for the appellant, which cannot be noticed in the decision. The ejectment was tried in 1826, of course, is embraced by the act of 1825, ch. 117, and this Court can only review such questions of law, as were acted on by the Court below. In the first bill of exceptions, the only question decided by the Court below, was, that the deed from *Young to Scott*, made in 1803, under the evidence offered, conveyed no title to the said *Scott*; and in

the second bill of exceptions, the Court decided upon the question, whether the jury might presume from the evidence, that the sale reported by the trustee, under the decree of Chancery, was finally ratified and confirmed.

By the recitals in the deed of 1803, it appears, that *French* and *Young* were appointed by the Court of Chancery, trustees, to sell certain real estate of *John, Robert,* and *William Cary*—that the said trustees did expose to sale the said real estate, and that *George Scott* became the purchaser of part, and has paid the purchase money. It then states that *French* was dead, and that *Young*, in virtue of the decree of the Court of Chancery, did convey to the said *Scott*, his heirs and assigns, for ever, lots No. 1, 2, and 5, being part of a tract of land called “the resurvey on *Panmure*, and *Zero*,” &c.

This deed clearly shews on the face of it, the character in which *French* and *Young* acted; and to give it legal effect and operation as a deed under the decree of the Court of Chancery, a copy of the record ought to have been produced, to shew the trust reposed in them, and their legal performance of it. Although this deed could not have legal operation as a deed under the decree of Chancery, without producing a record of the proceedings, it shall be taken most strongly against the grantor, and if he had a legal interest in the land, that could be transferred by an ordinary deed of bargain and sale, the Court ought to give it effect as such.

On the 8th of August, 1791, the legal estate in both *Panmure*, and the *Resurvey on Panmure*, was vested in *John, Robert,* and *William Cary*, and by a deed of that day, they conveyed to *French* and *Young*, as joint tenants, in fee, the tracts of land called *Zero*, and *Panmure*, containing 375 acres, and part of *Palentine*, in trust, &c. By this deed, the legal estate in *Panmure* was vested in *French* and *Young*, as trustees, in joint tendancy. Although they were trustees, yet the legal estate vested in them jointly, and either could *at law*, convey his undivided moiety in the

land. The land having been sold by *French* and *Young*, if *French* died, *Young* could convey the whole interest in the land to the purchaser. If *French* was alive, still as *Young* was seized as joint tenant in fee, of an undivided moiety with *French*, by his separate deed of 1803, all *Young's* legal estate passed to *Scott*, the grantee.

The land in dispute in this ejectment, is lot No. 1, part of the *Resurvey on Panmure*; and to make the deed of 1803 available to the plaintiff, it must convey an interest not only in *Panmure*, but in lot No. 1, part of the *Resurvey on Panmure*. Whether it has this effect, must depend entirely on the legal operation of the deed of 1791.

This deed conveys *Panmure*, containing 375 acres, without giving any description of the land intended to be conveyed, by courses and distances expressed in the deed. If there is nothing to aid the legal operation of this deed, it can only convey *Panmure*; for certainly, a deed for one tract of land, cannot *per se*, convey another tract. No testimony has been introduced to shew, that *Panmure*, and *The Resurvey on Panmure*, are the same tract, but called by different names, and as before observed, no description of the land intended to be conveyed, by courses and distances, is given in the deed, to extend the land beyond that conveyed *by name*. The number of acres in the deed, being more than *Panmure* contains, cannot alone effect that object, and the reference to the patents, *in legal intendment*, can only relate to the patents of *Zero*, and *Panmure*.

It has been supposed, the location of the deed of 1791, on the plots, not being counter-located by the defendants, is an admission by them, that *Panmure*, and *The Resurvey on Panmure*, are but one tract of land. A location of a tract of land, by one party in ejectment not counter-located by the other, admits the location to be correct—that is, that the land is correctly described on the plots; but it does not admit *the title* to the land thus located—*this must still be proved*. To recover in ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land

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by location, and *also*, that he has a legal title to the land thus located. The admission in this case to the greatest extent, is only, that the deed of 1791, is correctly laid down by the plaintiff, on the plots; but still requires him to shew that this deed, by its legal operation, conveyed the land thus located. The deed, from any thing that appears in this record, could only convey to the grantees, *Panmure*, according to the lines, metes, and bounds, of that land, and as *Young's* title was derived from that source alone, his deed of 1803, could transfer no title to the land in controversy in this ejectment, that being part of *The Resurvey on Panmure*, and not included within the lines of the original tract. We concur in opinion with the Court below, that the deed of 1803, conveyed no title, *that could avail the plaintiff in this ejectment*.

The Court having decided against the plaintiff, as to the operation of the deed of 1803, under the evidence *then* offered, he, in addition to that contained in the first bill of exceptions, produced a copy of the record of the proceedings in Chancery—a petition to the Chancellor, by *Ariana French*, and the order of the Chancellor thereon. He then prayed the opinion and direction of the Court to the jury, that they may, and ought to presume, from the facts given in evidence in the cause, that the return of sales, as reported by the trustees in the proceedings in Chancery, was finally ratified and confirmed. The Court were divided in opinion, and did not grant the direction, as prayed for by the plaintiff.

It appears from the record of the proceedings in Chancery, that a petition was filed by *John, Robert, and William Carey*, and *French*, and *Young*, praying the Chancellor to appoint *French* and *Young* trustees, to sell certain real estate, that had been conveyed to them by the said *Carey's* in trust. That a decree passed accordingly. That *French* and *Young*, as trustees under this decree, sold the said real estate, and *George Scott* became the purchaser of part of the same. A report of this sale was returned to the Chan-

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cellor, who, on the 31st of October, 1795, passed an order of confirmation, *nisi*, &c., but it does not appear from the record, that the report of the sale was *finally* ratified and confirmed.

The law is well established, that facts to aid a title, may, in some cases be presumed, and the question now presented to us is, whether the evidence in this cause was sufficient to justify the jury in presuming the report of the trustees, was *finally* ratified and confirmed.

The decree was passed in the year 1795; the sale under that decree; the report of the trustee was returned; and the order of confirmation, *nisi*, &c. all in that year. The deed from *Young* to *Scott*, in 1803, and this Ejectment, was tried in 1826. At least thirty years elapsed between the order *nisi* and the trial of the cause, and twenty-two years between the deed to *Scott* and the trial.

The decree in express terms directs, that *no deed shall be given* until the report of sales shall be *finally* ratified and confirmed, and the purchase money paid. It is not to be intended the trustee disregarded this injunction. He had no interest in violating it, and the law will always lean to the presumption that a trustee has faithfully executed his trust. Here is a deed under the decree of Chancery, which ought not to have been made, unless the report had been *finally* confirmed; and upon the hypothesis that the report was *finally confirmed*, is the only fair way to account for it. This presumption is strongly sustained by the other evidence in the cause. The petition of *Ariana French*, although not of itself sufficient to create the presumption, may be called in aid of other evidence, to effect that purpose. This petition was filed in 1803, the same year in which the deed was executed, and but a few years after the order of confirmation, *nisi*. It was almost a cotemporaneous act with the deed. This petition states the decree of the Chancellor; the report of sales made under that decree; that the report had been *finally ratified and confirmed*, and that *Scott*, the purchaser, was ready to pay the purchase

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money. It further states, that *Archibald Orme* was entitled to part of the purchase money, *the proceeds of the sale under the decree of Chancery*, and prays the petitioner (from the facts stated in her petition) may be substituted in the place of *Orme*, and *that the trustee may be directed to pay her claim*. The Chancellor, in his order, says he has considered the petition with the *vouchers and proofs* therewith filed, and directs the petitioner to be substituted in the place of *Orme*. It may be true that this substitution might have been directed, although no proceedings had taken place to sell the land; but when the petitioner states the proceedings as the foundation of her claim, and the Chancellor declares he had considered the petition *with the vouchers and proof therewith filed*, is it not fair to conclude he was satisfied of the truth of the facts as stated in the petition? It was then a recent transaction, and in his own Court.

In 1804, an action of Ejectment was instituted by *Scott*, the grantee in the deed of 1803, against *Robinson Eastburn*, (who was originally the defendant in this Ejectment) to recover the same land now claimed. This case was tried in 1808, when there was a verdict for the plaintiff, judgment, and a writ of possession. In both Ejectments, the defence was taken on warrants, and the defendant took defence, not for all the land claimed, but only for so much thereof *as was included within the lines of other tracts*. The possession of a great part of the land intended to be conveyed by the deed of 1803, has, from that time, been in the grantee named in the deed, and those who claim under him, and *only part* has been disputed, as being within the lines of other tracts.

When we view the whole evidence, the presumption appears irresistible, that all was done in Chancery that was necessary to give legal effect to this deed under the decree. This was a judicial sale, the purchase money *bona fide* paid, and every fair legal presumption ought to be allowed to sustain it.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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GLENN, Trustee of PEASE vs. VON KAPFF.—June, 1830.

An insolvent debtor who has obtained his final discharge, and released to his trustee all his interest in the property in dispute, and residue of his estate after paying his debts, is a competent witness in an action in which his trustee is plaintiff, to prove, that at the time a certain deed was executed by such witness and his partner to the defendant, who was their creditor, they contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make such deed, and then apply for the benefit of the insolvent laws, and promised to aid them thereafter, though the effect of such testimony would be to avoid his deed, under our insolvent system.

APPEAL from *Baltimore County Court*.

Action of *Trover*. The declaration stated that the plaintiff, (now appellant) on the 29th of June, 1824, was lawfully possessed, as of his own property, of the lease of two small brick buildings, and one frame building and shed, one steam boiler, &c. and sundry other articles then contained in the said brick and frame building and shed, of great value, &c. and being so possessed thereof, he afterwards, to wit, &c. casually lost the said lease, and the above recited and enumerated goods, &c. out of his possession; and the same afterwards, &c. came to the possession of the defendant, (the appellee) by finding. Yet, &c. The defendant pleaded not guilty, and issue was joined.

At the trial the plaintiff offered in evidence, the petitions and insolvent papers of *Adriel Pease* and *John N. Schultze*. The petition of *Pease* to the commissioners of insolvent debtors, was dated 7th January, 1824. The appellant was appointed his permanent trustee, before the institution of this suit, and *Pease* was finally discharged by the County Court, under the insolvent debtors' act, on the 25th September, 1824. Similar proceedings were proved in relation to *Schultze*; and also that the various articles mentioned in the declaration in this cause, were on the — day of January, 1824, the property and in possession of *Pease* the insolvent. The name of the defendant was not mentioned as a creditor in the insolvent's petitions and papers.

The defendant gave in evidence certain contracts between him and the insolvents, which need not be stated, and a bill of sale, dated 5th January, 1824, from the insolvents to him for the articles mentioned in the declaration. The plaintiff then called *John N. Schultze*, one of the parties to the said bill of sale, who released to his trustee all his interest in and to said property, and to any residue of his estate which might remain after paying his debts, and offered to prove by such witness, that at the time the said bill of sale was executed, *Pease* and *Schultze* contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make the bill of sale to him, and then to apply for the benefit of the insolvent laws; and also promised to aid them as soon as they obtained the benefit of said laws; and that the said bill of sale was executed with intent to give the defendant an undue and improper preference over the other creditors of *Pease* and *Schultze*, and every of them. To the admissibility of which witness to prove all or any of the above facts, the defendant objected, 1st. Because the said witness was a party to the said bill of sale, and cannot be heard in a court of law, to impeach his own deed; and 2d. Because it was not competent for him to give evidence to show that he contemplated being or becoming insolvent, within the view of the Acts of Assembly for the relief of insolvent debtors. And the Court (ARCHER, Ch. J., and HANSON, A. J.) being divided in opinion as to the admissibility of the said witness to prove the aforesaid facts, the said witness was rejected. The plaintiff excepted; and the verdict and judgment being against him, he appealed to the Court of Appeals.

This cause came on to be argued before BUCHANAN, Ch. J., EARLE, and MARTIN, J.

Johnson and *Frick*, for the appellant, contended,

1. That *John N. Schultze* was a competent witness to shew that he contemplated being and becoming an insolvent

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debtor, within the view of the Acts of Assembly, at the time of the execution of the bill of sale to the appellees. 2. That he was a competent witness, to impeach and invalidate the said bill of sale. They referred, in their arguments, to *Butler vs. Cooke*, *Cowper's Rep.* 70. *Archbold's Digest*, 435, 438. *Masters vs. Drayton*, 2 *Term Rep.* 497. *Walton vs. Shelly*, 1 *Term Rep.* 496. They insisted, that the rule, that a man cannot be heard to impeach an instrument to which he has signed his name, is restricted to negotiable securities. They also cited, *Bent vs. Baker*, 3 *Term Rep.* 32. *Kenyon's Opinion*, 34. *Pleasants vs. Pemberton*, 2 *Dallas's Rep.* 197. *Baring vs. Shippen*, 2 *Binney*, 154, 168. *Winton vs. Saidler*, 3 *Johns. Cas.* 185. *Jackson vs. Frost and Haff*, 6 *Johns.* 135. 1 *Phillips' Ev.* 33, 34, (note a.) *Wilson vs. Lenox*, 1 *Cranch*, 201. *Ringgold vs. Tyson*, 3 *Harr. and Johns.* 172. 3 *Stark. Evid.* 17, 37. *Rands vs. Thomas*, 5 *Maule and Selw.* 244. 2 *Stark. Ev.* 298. (note e.) 1 *Harrison's Index*, 511, 513. *Howard vs. Mitchell*, 14 *Mass. Rep.* 241.

Mayer and Learned for the appellee, referred to the act of 1805, ch. 110. The act of 1812, ch. 77. 1816, ch. 121, sec. 6. They contended, that the deed to the appellee did not give a preference, so as to invalidate it under the Act of Assembly. *McMechen vs. Grundy and Sons*, 3 *Harr. and Johns.* 185. They cited likewise, *Graves vs. Delaplaine*, 14 *Johns.* 146. *Wesley vs. Thomas*, 6 *Harr. and Johns.* 24. 2 *Stark. Evid.* 211. *Revere vs. Leonard*, 1 *Mass. Rep.* 91. 1 *Day Rep.* 17. 2 *ib.* 121. *Cantee vs. Sumter*, 2 *Bay South Car. Rep.* 93. 1 *Stark. Evid.* 206, 302.

BUCHANAN, Ch. J., delivered the opinion of the Court.

It is a settled, general rule of evidence in this State, that every person not interested in the event of the suit is a competent witness; the objection going to his credibility rather than to his competency. Here the suit was brought

by the trustee of an insolvent debtor; it is an action of *trover* for certain goods held by the defendant, under a bill of sale executed to him by the insolvent, two days before the date of his application for the benefit of the insolvent laws. And the insolvent himself, being produced to prove, that at the time of executing the bill of sale to the defendant, (who is stated to have been a creditor,) he contemplated becoming an insolvent debtor, and so informed him. His testimony was objected to, on the ground that he could not be heard in a court of law to impeach his own deed, and his testimony was rejected, upon a misapprehension we think of the rules of evidence before stated, as prevailing in this State, there being nothing that we can perceive, to exempt it from the operation of that rule. The party offered as a witness having released to the trustee all his interest in the property in dispute, and in any residue of his estate which might remain after paying his debts, he had no apparent interest in the event of the suit, and the objection, if any, was to his credibility, and not to his competency. This as a general rule must be acceded to from necessity, if not for the preservation of consistency in the practical application of the law of evidence.

If there are cases in which a man shall not be called to impeach or invalidate an instrument which he has signed, they are exceptions; and we can perceive nothing to bring this case within the exception.

By the insolvent laws a deed or assignment made to a creditor or security, with the expectation of becoming an insolvent debtor, and with the intent to give an under preference to such creditor or security, is declared to be void, and the property attempted to be conveyed or assigned, to vest in the trustee of the insolvent debtor. The intention of the insolvent at the time of making the bill of sale in question, was the matter proposed to be proved, and that lying in his own breast, and being a matter difficult, if ever to be proved in such cases, except by disclosures by the party himself, it would seem to be a case peculiarly fit for

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the admission of his testimony; and we think the court below did wrong in rejecting it.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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COMPANY.—*June, 1830.*

Orders for, and contracts of insurance are to be liberally construed, and with reference not only to the situation and circumstances of the subject matter of insurance, but also of the parties by whom the insurance is effected.

So an application for insurance from *Rio de la Plata* to *Havana*, which stated "said vessel will sail from *La Plata* in the course of *this month*," made by a merchant in *Baltimore*, to an insurance company there, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief, or opinion of the applicant, that she would sail at the time mentioned.

In an action on a policy of insurance, the question, whether the risk has been materially increased by the sailing of the vessel on her voyage, at one time, instead of another, ought not to be submitted to the jury, when no testimony whatever had been adduced on the subject, to warrant the jury in drawing such a conclusion.

It is competent to offer evidence, whether, according to the custom and usage of insurance companies, the word cargo, in an order for insurance, would be considered as covering live stock.

A policy on cargo, or goods and merchandize, will not cover articles which are stowed upon deck.

The word cargo, in an order for insurance, does not, ordinarily, cover live stock; but if live stock constitute the only article of exportation from the port from which the vessel carrying the insured property is to sail, to the port to which she is destined; or if, according to the mercantile usage of the place of effecting the insurance, the word cargo is understood to cover live stock, then an insurance under that general denomination, will cover live stock.

The existence of such usage, when evidence is offered for and against it, is a question exclusively for the jury.

Uniformity of decision among the several States of the Union, on questions connected with contracts of insurance, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce the sanction of principles established in the other States.

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APPEAL from *Baltimore County Court*.

This was an action of *Covenant* on a policy of insurance. It is the same case which was before the Court of Appeals at June Term, 1825, when the then judgment was reversed, and the record remitted to the Court below, with a writ of *procedendo*. 6 *Harr. and Johns*. 408. The death of the plaintiff below was suggested, and his administrators, (the now appellants,) made plaintiffs, &c.

1. At the new trial the plaintiffs offered in evidence the policy of insurance upon which this action was brought, entered into by the defendants, (the appellees) on the 23d of May, 1820. The sum subscribed to be insured, was \$6000. The policy stated, that “whereas *J. B. A. Allegre*, for the concerned, doth make insurance, and cause himself to be insured, lost or not lost, at and from *Rio de la Plata* to *Havana*, with liberty of *Martinico*, upon all kinds of lawful goods and merchandizes, laden, or to be laden, on board the good brig called the *Eugene*, whereof ——— is master for this present voyage, or whosoever else should go for master in the said vessel. Beginning the adventure upon the said lawful goods and merchandizes, from and immediately following the loading thereof on board of said vessel, at *Rio de la Plata* aforesaid, and so shall continue and endure, until the said goods and merchandizes shall be safely landed at ——— aforesaid, &c.” The policy was in the usual form, the assured having paid after the rate of 5 per cent. for the assurance. There was a clause, that in case of loss, such loss to be paid in 90 days after proof, &c. And if any dispute should arise relating to a loss, it should be referred to two persons, &c. The second article of the memorandum at the foot of the policy, is, “if the above vessel, after a regular survey, shall be condemned for being unsound or rotten, the company shall not be bound to pay their subscription to this policy.” The plaintiffs also gave in evidence, that the brig *Eugenes* ailed from *Monte Video*, on the river *La Plata*, on the 12th of July, 1820, for *Havana*, laden with 106 mules, and 4 jack asses, belonging

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to *Charles A. Chalumeau*, for whom the said insurance was effected; that the said brig was in all respects seaworthy; and that in the progress of her said voyage, she encountered tempestuous weather, by which she was much damaged, and the mules and jack asses all killed, except 10 mules; that the said brig was compelled, by the damage aforesaid, and the violence of the winds and waves, to put into *Rio de Janeiro*, where she was duly and regularly surveyed, and ascertained to be unworthy of being repaired, and thereupon sold; and that the said remaining 10 mules were also thereupon sold; and further proved, that the insured thereupon duly abandoned the cargo aforesaid to the defendants. The plaintiffs also read in evidence by consent, the protest, and other documents. The protest was made and sworn to by the master, mate, and two of the seamen of the brig *Eugene*, before the Vice Consul of the *United States of America*, for the port of *Rio de Janeiro*, on the 19th of August, 1820, detailing minutely all the particulars of the shipment of the cargo on board the vessel, her sailing on the voyage, and the loss sustained. At the same time, before the said Vice Consul, the master called for regular surveys, by good and capable men, &c. Then follows a bill of lading, dated the 8th July, 1820, signed by the master of the brig *Eugene*, and by whom was shipped from *Monte Video*, and bound to *Havana*, 106 mules and 4 jack asses. Also an account of the sale of the brig *Eugene*, condemned, as unworthy of repairs. Also an account of sales of the cargo of the said brig. The plaintiffs further read in evidence sundry depositions of witnesses, taken and returned under a commission issued for that purpose from *Baltimore County Court*, to certain persons, named as commissioners, at *Rio de Janeiro*; but as the questions decided by the Court below do not seem to depend upon the testimony taken under the commission, which was as to the condition of the vessel on her arrival at *Rio de Janeiro*, and the injury she had sustained, and as to the survey made of the vessel, and whether she could not have been repaired, &c. it is omitted.

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The defendants then read in evidence, by consent, the invoice of the cargo put on board the vessel, and an account of the charges and expenses incurred with the mules and asses, bought as a cargo for the brig *Eugene*, on account of Capt. C. A. *Chalumeau*, viz: 107 mules and 4 asses, which, with the expenses, &c. amounted to \$795 50; which cargo remained on board on account of the above mentioned captain. Signed, *Monte Video*, the 3d June, 1820. The defendants also offered in evidence the following order for insurance, whereon the said policy was founded. "Baltimore, 23d May, 1820. Gentlemen,—Insurance is wanted for account of the concerned, at and from *Rio de la Plata* to *Havana*, with liberty of *Martinico*, on the cargo of the brig *Eugene*, *Charles A. Chalumeau*, master, valued at \$6000. Said brig will sail from *La Plata* in the course of this month. What will be the premium? *J. B. A. Allegre.*" "5 p. c." "*Agreed, J. B. A. Allegre.*"

The defendants then prayed the court to direct the jury, that misrepresentation in a material fact, whether from fraud, mistake, or negligence, equally vitiates the contract, whether it be that of the insured, or his agents; that every representation respecting the time of the sailing of the ship is in law material; that the representation to the *Maryland Insurance Company* is positive that the ship will sail in May; and the plaintiff's intestate, having himself shown, that she did not sail till the 12th of July following; if the jury shall be of opinion that the danger of the voyage was increased by that circumstance in any degree, however small, and that the disclosure of that circumstance to the defendants was of a nature to have influenced their judgment in any degree, however small, either in taking, or declining the risk, or in enhancing the premium to however small an amount, this misrepresentation was a material one, which avoids the contract of insurance, and the plaintiffs are not entitled to recover on that policy; and the law is the same, although this misrepresentation on the part of the plaintiff's intestate might have been innocently made by

him, in ignorance of the true state of the facts, that then the plaintiffs are not entitled to recover. Which opinion and direction the Court, [HANSON, A. J.] refused to give, unless the risk was materially increased by the vessel not sailing at the time represented; and with this qualification, gave the direction prayed for. The plaintiffs and defendants both excepted.

2. The defendants then called a witness, who stated that he was a merchant of long standing, and had been a member of some one of the insurance offices in *Baltimore* from their first establishment; and asked him whether, according to the usage and custom of insurance companies, the above order for insurance would be considered as covering live stock? To which question the plaintiffs objected. But the court overruled such objection, and permitted the question to be asked. The plaintiffs excepted.

3. The plaintiffs then offered in evidence, that mules and jack asses, in 1820, and for many years before, were a common article of commerce and export from the river *La Plata*. That they were, during the times aforesaid, the chief articles of commerce between the river *La Plata* and *Martinico*; and that there was a trade in mules in 1820, from *La Plata* to the *West Indies* generally. The witness stated, that he knew nothing of the commerce in mules between *La Plata* and *Havana* particularly, except from his personal knowledge, which is confined to the following cases: He was at the river *La Plata* in March, 1820, and saw a vessel sail from that river loaded with mules, and saw her afterwards arrive at *Havana*—it was the *British* brig *Palmyra*. He believes her tonnage to be about 220 to 230 tons. She sailed with 170 to 180 mules, and arrived with only 33 alive, 4 or 5 of which died after she arrived. He saw another vessel, an *American* vessel, sail from the river *La Plata* with 180 or 190 mules, bound for *Havana*. The witness understood her destination from her captain. The witness understood that he afterwards put into *Charleston* in distress, and never arrived at *Havana*. The mules on

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board the *Palmyra* were stowed in two rows on the upper and lower decks. *Enseanado*, on the river *La Plata*, is the principal port for exporting mules. All mules from *Buenos Ayres* are embarked at *Enseanado*. More vessels, while the witness was at *Enseanado*, loaded with jerked beef and tallow, than mules; but the vessels for the *West Indies* loaded principally with mules. The witness was at *Enseanado* and *Buenos Ayres*, from March to July, 1820. The plaintiffs also offered in evidence, by another witness, that he was in the river *La Plata* in 1822, and that he understood that there was a trade in mules from the river *La Plata* to the *West Indies* generally, and principally to the *Windward Islands*; but has no knowledge of such a trade to *Havana* particularly. He, himself, carried a cargo of jerked beef from *Monte Video* to *Havana*. He knows of no instance of a cargo of mules from the river *La Plata* to *Havana*. But there might have been vessels loaded at *Enseanado*, about 18 miles below *Buenos Ayres*, which is the principal mule port on the river *La Plata*. The witness was not at *Enseanado*. They also offered in evidence, that mules sold in *Martinico* at \$120, and that mules from the *Maine* sold at *Jamaica* at from \$75 to \$160—averaging \$130, previously to the introduction of steam mills. That the mules from the *Maine* are much smaller than those from the river *La Plata*.

The defendants then offered to prove, by the testimony of *William Patterson*, who had been engaged in trade and commerce as a merchant in the city of *Baltimore*, and also as a director in one of the insurance companies established there, that a general policy on cargo does not embrace a cargo of live stock, or animals, according to the mercantile understanding and interpretation of such a policy in the city of *Baltimore*, and that when live stock or animals are meant to be insured, they are always insured by name, and that a much higher premium is asked than for an ordinary cargo of merchandize. The insurers consider a cargo of live stock more dangerous than an ordinary dead cargo, and

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would charge a higher premium for the former, than the latter. And upon looking at the order for insurance in the present case, he said that he would not consider it as an application to insure live stock or mules; and he believes it would be the general mercantile understanding of the construction of such order, that it did not embrace a cargo of live animals. They also offered to prove by *Daniel Howland*, another witness, who had been president of an insurance company, and a director for more than twenty years, and a commander of a vessel for many years previous, that there is a difference between ordinary cargoes and those of live stock or mules, in the price of transportation, and that the latter are considered the most dangerous. The insurers would make a difference in the premium they would ask, for the insuring the one or the other of such cargoes. He also proved, that in his own opinion the order in this case would be considered, as intended only to cover ordinary cargoes, and not live stock or animals; and that he believed such would be the understanding and usage of underwriters, and others engaged in insurance, of the sense and meaning of the terms used in the said order. They further offered to prove by *David Winchester*, another witness, who had been a president and director of an insurance company in *Baltimore* upwards of 25 years, that the order of insurance in this case would not, in the judgment of underwriters, and others engaged in effecting insurances, be considered as covering a cargo of live stock or mules. That the words therein used, have acquired an appropriate sense between insurer and assured, by which they are understood to apply to a cargo not attended with any extraordinary perils, and are not understood to apply to live stock or mules; and that the premium which would be asked for insuring a cargo of mules would be higher, than for insuring an ordinary dead or inanimate cargo. They also offered to prove by *Hugh Birckhead*, a director of one of the insurance companies in *Baltimore*, that the order for insurance in this case, according to the general understanding among insurers, and others,

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in *Baltimore*, would not be considered as an offer to insure mules and jack asses; that the difference between a cargo of live stock and dead goods is so great, that he should consider it the duty of the insured to state the fact that live stock was intended to be covered, in order to put the insurer and insured on an equal footing; and that the difference of premium on the insurance of those two kinds of cargo was considerable. They also offered to prove by *Henry Thompson*, long a director in an insurance company in *Baltimore*, and extensively engaged in commerce, that live stock is always considered by underwriters as a more dangerous cargo than dead goods; and the premium of insurance is much higher for insuring live stock, than dead cargo; and that such an order would not, in his opinion, be considered as an order for live stock. That according to the usage of merchants and insurers, the danger of a vessel, in the transportation of mules and live stock, is greater than that of a vessel employed in carrying a cargo of dead goods; and that the premium would be enhanced on a vessel carrying mules and jack asses; which fact the defendants also proved by the testimony of the said *Daniel Howland*, *David Winchester*, and *William Patterson*.

The plaintiffs then offered in evidence, by competent witnesses, long acquainted with insurance business, and with the usages of trade and mercantile understanding in matters of commerce, that there was no usage of trade or mercantile understanding which excluded mules and jack asses from the general term of cargo, used in an order for insurance, or otherwise; and that there was no usage of trade or general mercantile understanding in *Baltimore*, or general understanding among the insurers in *Baltimore*, by which live stock, or mules and jack asses, would not be considered as covered by a general insurance on cargo. They also offered in evidence, that the term cargo in the aforesaid order for insurance, would, according to the mercantile understanding and usage of trade, among the insurers and merchants of *Baltimore*, be considered as covering

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mules and jack asses. They further offered in evidence, that a cargo of mules and jack asses is not a more hazardous cargo for insurance than any common cargo; and that a cargo of mules does not increase the risk of the vessel.

The plaintiffs then prayed the court to direct the jury—
1st. That if the jury find from the evidence that in the year 1820, and for some years before, mules and jack asses were well known articles of exportation from *Rio de la Plata*, and that cargoes of them were about that time usually exported, and had been for some years before, usually exported from that river, then the omission of the said *Allegre* to state to the underwriters, before, or at the time of making the said insurance, that the said cargo was to be a cargo of mules and jack asses, is not such a concealment as will vitiate the policy, on which this suit is brought; unless the jury shall find from the evidence, that according to the known and established usage of trade in the city of *Baltimore*, the order in question was construed and understood not to comprehend mules and jack asses in the cargo therein mentioned. 2d. If the jury find from the evidence, that mules and jack asses, in the year 1820, and for several years before, were usual articles of exportation from *Rio de la Plata* to *Martinico*, then the omission of the said *Allegre* to represent to the underwriters that the cargo, mentioned in the said order for insurance, was a cargo of mules and jack asses, is not such a concealment as will vitiate the said policy; unless the jury find from the evidence, that according to mercantile usage and understanding in the city of *Baltimore*, the word cargo in the said order did not comprehend mules and jack asses. Which directions, and each of them, the court [HANSON, A. J.] refused to give; but gave the following opinion and direction to the jury: An usage of trade must be definite, uniform, certain, sufficiently long established, and so generally known, as to warrant the conclusion that the parties contracted in reference to it. This is necessary, in order to be obligatory on either party. First—There is no usage

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proved that the word cargo necessarily, in mercantile understanding, either excludes live stock, or that it includes it; nor of an usage that a greater premium would be charged on an insurance on mules, than on a dead cargo. Secondly. There is no evidence of an usage in trade of mules from the river *La Plata* to *Havana*. There is evidence that the only trade from *La Plata* to *Martinique* is in live stock; and if the voyage insured was from that river to *Martinique*, and no further, the policy would be good—the underwriters being bound to know the trade as one of an established usage. But the *terminus* of the voyage was the *Havana*; and no usage of trade in mules to that place from the river *La Plata* being proved, the underwriters were not bound to know it, from the circumstance of liberty to *Martinique* being stipulated in the policy, and consequently, not bound to inquire about the specific nature of the cargo. The insured, therefore, was guilty of a concealment fatal to the policy, provided the jury believe, that the risk was materially increased by the cargo being of mules, instead of a dead cargo. We say materially, because if all of a cargo was a dead one, yet from the different qualities of articles of commerce, one commodity must be, in some degree, always more hazardous than another. A cargo of buoyant articles would not abstract the attention of the crew in a storm from the navigation of the vessel, whereas the necessity of throwing over a heavy cargo, for the purpose of lightening the vessel, might; but such a slight difference in the risk would not vitiate the policy; because contracts of insurance, being contracts of indemnity, are to be construed liberally, in order to get at the true equitable intentions of the parties, and are not to be settled according to the very letter of the contract, and rendered void because the cargo shipped was different from the one appearing on the face of the policy, technically construed, provided all things were done in good faith, and the situation of the parties not essentially changed, by a cargo being mules, instead of a dead cargo, even if no usage of such trade

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existed; unless the risk was thereby materially increased; and this is the only question open to the jury, which they must decide from the evidence they have heard at the bar. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Mayer, for the appellants, contended upon the *first* exception, that the order does not contain a positive representation in law, that the vessel would sail in May, but must be understood by the Court, as expressing only a calculation or belief, that the vessel would then sail. Upon the *second* exception he contended, 1. That the evidence of a usage of insurance companies, being but of a particular portion of the commercial community, was inadmissible. 2. That evidence of such a usage, even of the mercantile community at large, would have been inadmissible. Upon the *third* exception, he said, 1st. The words “cargo, and *lawful goods and merchandize*,” legally comprehended the mules and jack asses, if proved to be articles of commerce. 2. That there was evidence of their being articles of common export and commerce from *Rio de la Plata*; and that the underwriters were bound to know they might be embraced by the word “cargo,” in the order, and must be considered as embraced in the words of the policy, “*lawful goods and merchandize*.” 3. That the vessel having, by the words “*liberty of Martinico*,” the right of trading at *Martinico*, and there being evidence of mules being the only articles of trade from the river *La Plata* to that island, the insurance covers the cargo in question, although not specifically made known to the underwriters by the assured. 4. That the opinion and direction of the Court, under the *third* exception, is, in other respects, erroneous. 1. There was no representation, either in a real or technical sense, that the vessel would sail in May. As the agent of the assured

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and the underwriters stood, the agent could not be understood as stipulating that the vessel would sail in May; he did not say he would warrant her doing so. A party may be so situated, that his language cannot be understood in a literal sense. *Hubbell vs. Glover*, 3 *Campb.* 313. *Bowden vs. Vaughan*, 10 *East.* 415. *Bryan vs. Featherstone*, 4 *Taunt.* 869. *Barber vs. Fletcher*, *Doug.* 306. A representation is never looked upon as a part of the policy, and does not affect it, except in cases of fraud. The insured need not prove the truth of all his representations; the underwriter must show that he has been deceived. *Philips on Insurance*, 84. 2. It is right that the contracts of parties should be affected by the usage of trade, because it applies to both, but that is not like suffering insurance companies to interpret their own contracts. 2 *Stark. Ev.* 448, 449, 450, 451. 3. It was sufficient for us to show that goods and merchandize include all articles of trade, and that mules and jack asses are articles of trade. The question is not as to the variance of the risk, because if that was material, then the least variance would be as fatal as the greatest. The prayer in the *third* exception, was on the ground that there was evidence of the usage of trade, and as there was evidence, it was for the jury to say whether the usage we contend for was proved. The usage attempted to be proved was, that mules and jack asses are included in the term cargo. The sense of terms may be enlarged in policies of insurance. 1 *Marshall*, 474, 475, 93, 323. *Philips on Insurance*, 66, 89. The only circumstances which the assured are bound to disclose, are those which may be supposed to be in his peculiar knowledge. When the offer for insurance is ambiguous, the underwriter is bound to ask an explanation; and if he does not, the construction most against him shall be adopted. *Livingston and Gilchrist vs. Maryland Insurance Company*, 7 *Cranch*, 535. *McLanahan vs. The Universal Insurance Company* 1 *Peters S.C.R.* 187. There can be no concealment except as to a collateral fact. *Philips on Insurance*, 80. *Boyd vs.*

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Dubois, 3 *Campb.* 133. It is not necessary to give information as to political events, or whether the articles are contraband of war. *Skidmore vs. Desdoity*, 2 *Johns. Cas.* 77. *Duguet vs. Rhinclander*, *Ib.* 476. *Seton and Co. vs. Low*, 1 *Johns. Cas.* 1. *Richardson et al. vs. Maine Insurance Company*, 6 *Mass. Rep.* 102. *Philips*, 89, 90, 102, 108. There is in this policy a memorandum of excepted articles, and therefore no other article is presumed to be excepted to. Insurance for whom it may concern, will cover all interests. *Buck and Hedrick vs. Chesapeake Insurance Company*, 1 *Peters S. C. R.* 151.

Meredith, for the appellee. The first question is, whether the representation in this case is such as to be binding on the parties; its materiality has been decided by the jury. A representation is the affirmation or denial of a fact. *Philips*, 84. The order for insurance says, that the brig will sail from *La Plata* in the month of May. There is a distinction as to the representations made by the owner of the goods, and the owner of the ship. *Hubbard vs. Glover*, 3 *Campb.* 312. Representations which must be founded on expectation or calculation are not binding, but parties are held to the truth of positive statements. *Dennistown et al. vs. Lillie and al.* 3 *Bligh's P. R.* 202. A representation and a warranty differ in this, that the former does not affect the contract, unless it be of a material fact; but a warranty, if false, destroys the contract. The case of *Bryan vs. Featherstone*, 4 *Taunt.* 869, was merely the expression of an opinion. There are two prayers in the 3d exception; the difference between them is, that in the one, the course of trade from *La Plata*, generally, is relied on; and in the other, from *La Plata* to *Martinico*. Does the legal signification of the word "*cargo*," include live animals? If it does not, can the course of trade be resorted to, to control the legal sense of the term?

It is admitted, that as a general rule, it is not necessary to describe the cargo, but live animals are the subjects of a

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special insurance. *Bottomry* and *Respondentia* interests, are not included in the term cargo. *Glover vs. Black*, 3 *Burr.* 1394. 1 *Marsh*, 318. There are many articles properly termed goods, which are not comprehended under the general terms goods, wares, and merchandize, in the policy. *Brough and Wetmore*, 4 *Term Rep.* 206. 1 *Marsh*, 320. Articles clearly included in the term goods, are not covered by the policy, if exposed from their situation, to peculiar perils. 1 *Marsh*, 320. *Lenox vs. United Ins. Co.* 3 *Johns. Cas.* 178. 1 *Caines*, 44. Those articles which from their nature are subject to detriment or diminution in value, are not to be considered as insured against, unless the insurer knows of them. 3 *Kent's Com.* 247. *French Com. Code*, 213. A cargo of living animals must, necessarily, be in more danger than a dead cargo. *Woolcot, et al. vs. Eagle Insurance Company*, 4 *Pick Rep.* 429. In all the cases in the English books, insurance upon living animals was always effected, *eo nomine*. Is an underwriter to be presumed to enter into his contract with reference to the course of trade? According to the signification of the term cargo, the property in this case would be excluded; it could not here have been the intention of the party to insure a cargo of this description.

The policy was an open one for \$6000, and the first cost of the mules, &c. was less than \$600. You are not to look at the value of the cargo at the place of destination, but to the selling price at the place of shipment, in an open policy. 3 *Kent's Com.* 221. *Carson and Smith vs. Marine Ins. Co.* 2 *Wash. Cir. Court Rep.* 468. Asking for insurance for \$6000, is evidence that no such cargo was contemplated, because, instead of one, it would load 16 or 17 vessels. Is there any evidence of a course of trade which can extend the meaning of the term cargo?

The proof is, that according to the usage in *Baltimore* among underwriters, the word cargo does not include living animals, and the contract in this case was between a *Baltimore* office, and the plaintiff's agent, living in *Baltimore*.

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Evidence that mules, &c. with other articles, were exported generally from *La Plata*, cannot affect a particular policy of insurance. In this case but two instances are proved of shipments of such articles from *La Plata* to *Havana*, and these cannot establish a usage. 1 *Marsh*, 186. A liberty to touch, does not justify trading at all events, if delay is created. *United States vs. Paul Shearman*, 1 *Peters Cir. Court Rep.* 98. It is not material what was the course of trade from the river *La Plata* to *Martinico*, the intermediate port, because the course of trade, between the port of departure and the intermediate port, is never looked to. No usage of trade has been proved in this case, which can be binding: to be binding, the usage must be exclusive, definite, uniform, and well known. *Philips*, 18, 16. 1 *Marshall*, 186, 320. *Park*, 303, 304, 305. *Parker and others vs. Jones*, 13 *Mass. Rep.* 173. The trade in mules and jack asses, not being exclusive, could not have been in the contemplation of the underwriters. The Court below said no usage was proved to include or exclude this cargo. Where Courts have put a construction on the terms of a contract, no evidence of usage giving a different construction can be received; but no such construction as has been contended for has been put by the Courts.

Wirt, also for appellee. We insist on two propositions. 1. If there is in the record any thing which is fatal to the plaintiff's recovery, errors by the Court below, in other respects, will not induce this Court to order a *procedendo*. *Turnpike Co. vs. Barnes*, 6 *Harr. and Johns.* 61. 2. The appellant cannot take advantage of errors, unless they be to his prejudice. The question in the *first* exception is as to the effect of the representation. The prayer of the defendant is, that there was a representation as to the time of sailing, and the Court say, that if the variance between the actual sailing of the vessel, and the time mentioned in the

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offer for insurance, materially increased the risk, then it avoided the policy.

The appellant contends, that this was not a representation; but every positive statement as to the time of sailing, is a material representation. 1 *Marshall*, 463. And every material representation, either by the assured or his agent, which is not true, destroys the policy. 1 *Marshall*, 457. We admit that the statement of the time of sailing, must be positive, and not expressed as mere matter of belief, but we insist in this case, that the statement was positive, and is therefore binding. 1 *Marshall*, 454. If the broker or agent make the statement as matter of belief, or expectation, the underwriter is bound to inquire, but not when the statement is positive. It is contended here, however, that although the terms used were positive, (and that is admitted) yet as the condition of the party was such that he could not know certainly the truth of his statement, he must be considered as merely affirming his belief. We have a right to suppose that the statement made by the agent was made by the authority of *Chalumeau*, the principal, who was the master of the ship. It is immaterial whether the party making the statement knows the fact or not; if it be a material fact, and he undertake to speak positively, he is answerable for its truth. 1 *Marshall*, 456. And it is the same whether the representation is made by agent or principal. 1 *Marshall*, 457. *Fitzherbert vs. Mather*, 1 *Term Rep.* 12. If it be true, that the statement of the time of a ship's sailing, (being abroad) is to be considered as the representation of belief, then it follows that a ship abroad cannot be insured at all. In *Doug.* 247, *Lord Mansfield* speaks of the importance of accuracy in regard to a ship's sailing. In reference to the position that a representation of this character is to be treated as the expression of an opinion, he referred to 3 *Bligh's Par. Rep.* 202. 3 *Campb.* 312, 313, cited on the other side, was a statement, not as to time of sailing, but the representation there, was as to the risks being a summer or winter risk. The positive statement

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which was not true, was, that a cargo was ready. The Court in that case say, that the time of sailing was the only fact which the party could be presumed to know. The fact that a cargo is ready, is not a fact which the party is bound to know, but he is bound to know whether the ship has sailed or not. The case of *Bowden vs. Vaughan*, 10 *East*. 415, was the case of a representation made by the owner of the goods, who had no control over the sailing of the ship.

In the case before the Court, the representation was made by both the owner of the goods, and master of the ship, and therefore is binding. *Park*, 284. The case in *Bligh* seems to condemn the decision in 10 *East*, 415, because in *Bligh* the policy was on ship and cargo, and the house of lords might, if they had approved of the case in *East*, have decided the policy to be good as respected the owner of the goods, who had no control over the ship, and bad as regarded the ship owner.

The case in 4 *Taunton*, 869, was a representation made to a subsequent underwriter, and there was nothing said as to the time the ship would sail, nor positively where she was; it was merely said that she was in one of three situations. In *Barber vs. Fletcher, Douglass*, 306, the word *expected* is used. The jury in this case having decided the representation to be material, there is an insuperable bar to the recovery of the plaintiff, should it be sent back. Parol proof may be resorted to, to explain technical terms used among merchants, unless an interpretation has been assigned them by the Courts. 2 *Stark*. 455. *Allegre vs. The Maryland Insurance Company*, 6 *Harr. and Johns*. 410, 411. Suppose it could be shown that among insurance companies the word cargo is never understood as including living animals; could not proof be admitted to prove the understanding? It is objected, however, that the evidence was admitted to restrain the ordinary import of the term cargo, which it is said cannot be done, though proof would be admissible to enlarge it. But is this position true? the

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proof went neither to enlarge nor limit the sense of the term, but simply to give it its technical meaning; and this may be done. 1 *Phillips' Ev.* 490. *Phil. on Ins.* 18. The only difference between the plaintiff's two prayers in this exception is, that in the first, the termination of the voyage is not, and in the second it is, given.

The question of usage, is a question of law, and for the Court. 2 *Stark. Ev.* 452. The usage must be reasonable, and is to be decided by the Court, as in respect to notice of protest of bills of exchange. But the instruction that there was no usage, was advantageous to the appellants, and therefore they cannot object to it. The plaintiff did not put his prayer upon the ground that there was, or was not an usage, but that there was a trade in such animals from *La Plata*, and this the Court did not deny. The Court said there must be a material increase of risk to require a disclosure, and in this they were right. It is not important that every part of the opinion should be sound, if the general result is right: if the word cargo, does not include live stock, then the judge was right; if it does, he was wrong, and his judgment must be reversed. Does the word include live stock? goods lashed upon the deck are cargo, yet they are excluded from the policy, because they are exposed to an increased risk. Unless specified, they are excluded upon that ground, and this shows that the universality of the meaning of the word cargo, contended for, cannot be maintained. No case can be found in which the word cargo has been decided to include dead and living animals. *Marshall*, 93, cited on the other side, merely says, that slaves were formerly insured as merchandize: he gives no case, professes to give none, nor does he say what information must be given to the underwriter, nor what sort of an order was required. The authorities show, that live stock must always be insured, specifically and *nominatim*. *Woolcot, et al. vs. Eagle Insurance Company*, 4 *Pick.* 433. The distinction is not between different descriptions of dead cargo, but between dead and living cargo,

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and this case demonstrates the importance of the distinction. The condition of the animals in the storm, and the attention necessarily given them by the crew, shows how much more danger there is in a cargo of this sort. This is a new question, and therefore you may look to the reason of the thing: is it not most reasonable that parties should be bound to disclose the nature of the cargo, when it is one of this description? From *Enseanado*, there is a trade exclusively in mules, and here the party was careful not to speak of that port, but spoke of the *La Plata*, where there is a mixed trade. As there is a trade in other things from *La Plata*, will the Court exclude living animals? The *termini* of the voyage is always in the contemplation of the underwriter; and as between the *La Plata* and the *Havana* there is no such trade in living animals, as could induce him to look to a cargo of this description.

Taney, (Attorney General) in reply.

The first question is, was the representation in the offer for insurance, a statement of a fact, or merely the expression of an opinion. There is no evidence of improper motives on the part of *Allegre*. We contend, that it was no representation of a fact, according to the insurance law, but simply the statement of an expectation. The letter from *Allegre* to the office, is dated May 23d, 1820, and says the brig will sail in the course of the month. The underwriters could not have believed that *Allegre* had any pointed information on the subject. You do not, in construing a representation, always understand parties according to the literal meaning of the terms employed; you must look to their situation; the means of information they possess, and the subject matter about which they are speaking; and these things considered, *Allegre* could only be understood as stating an expectation. Was the insurance office misled? for if it was not, then there is an end of the question. He was speaking of a future event, and not a past one. When a party speaks of an event of which he may, or may not

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have knowledge, then, whether he state a fact, or express an opinion, will depend on the terms employed. Not so in regard to a fact of which he cannot have knowledge. 1 *Marshall*, 444, 455. For the definition of a representation, he referred to *Livingston and Gilchrist vs. Maryland Ins. Co.* 7 *Cranch*, 536. When a party speaks of a future event, he necessarily speaks of a *belief*, founded on facts, and cannot be understood as *asserting a fact*. In the case in *Blye*, the letter to the underwriter was written on the 18th of June, and stated that the vessel was to sail on the 1st of May; the letter, therefore, was written 49 days after the sailing was to have taken place. The argument in 3 *Blye*, 208, puts it on the ground that she was a missing ship. It was not a representation that she would sail on a given day, but that she should be kept in port until the day. She did not sail after, but before, the day mentioned. It was in the power of the party to keep the vessel in port as long as he pleased, and therefore is not like a representation that she is to sail on a particular day. Over the one event he has a control, but not over the other; saying that she was in port on the 1st of May, was representing her then to be in safety; if she had not sailed until the 1st of May, the 49 days would not have elapsed, and she would not have been a missing ship. Whether the time be material or not, is a fact for the jury. *McLanahan vs. The Universal Ins. Co.* 1 *Peters S. C. R.* 187, 188, 189. The case in 3 *Campbell*, 312, was an insurance on the ship, and therefore the distinction between the owner of the vessel and cargo, does not apply to this case. The assertion in that case was, that a cargo was ready, and it was equally as positive as the statement in this case, yet the Court say it was merely the statement of an opinion. In *Rice and others vs. The New England Insurance Company*, 4 *Pick.* 439, the letter of the agent stated, that he expected the vessel to sail on a particular day, and it was charged and proved, that he did not truly represent the facts upon which his expectation was bottomed. By his statement to the underwriters, he induced

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them to believe the vessel was in time, which the agent had reason to think was not the case. In *Whitney and al. vs. Havener*, 13 Mass. Rep. 172, the representation was, that the vessel would sail in five days from the date of the policy; yet the Court say it is not binding. The day of sailing is seldom material, and if the underwriter thinks so, why does he not ask for a warranty, as in most other cases. If the vessel sail *before* the time, it may be material, because then, as in the case in *Bligh*, she may be a missing ship at the time the insurance is effected, but her sailing after, cannot have that effect. It cannot be inferred, from the record, that the jury found the representation in this case to be material, as is said on the other side. Two questions were left to the jury, and the Court cannot know which they found for the defendant; both were material, and if either was found for defendant, the verdict must be in his favor. In 6 *Harr. and Johns*. 410, the judgment was affirmed; if the judgment is reversed, the party under the Act of Assembly, is entitled to a *procedendo, ex debito justitia*. In the 2d exception, the question is, not upon the admissibility of evidence of usage; but the point is upon the question asked. The question in 6 *Harr. and Johns*. 410, was not whether usage could be proved, but whether the proper kind of proof was offered. Usages may be proved by acts, but not by opinions. The attempt to prove the usage here, was by the opinions of witnesses. Usages which are not matters of law, cannot be established by the opinions of witnesses. 2 *Stark. Ev.* 449, 452, 453. The usage of the underwriters, unless generally known, or known to the agent of the assured, is not binding. *McGregor vs. Insurance Company of Pennsylvania*, 1 Wash. Cir. Court Rep. 39. *Cox's Dig.* 385, pla. 159. In the case of *Raborg vs. The Bank of Columbia*, 1 *Harr. and Gill*, 231, and the other cases, the usage was proved by acts, and not by opinions.

Did the omission to disclose that the cargo was of living animals, vitiate the policy? What is the policy? and what

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was the situation of the assured and the underwriter? *Chalumeau*, the owner and captain, was in *La Plata*, and when he requested his agent in *Baltimore* to effect insurance for him, might not have known what sort of cargo he would ship. He might have intended to purchase other articles; how then could he insure, except by the word cargo. He could not make a special insurance, because he knew not what articles he should buy. If the agent had insured mules, or other property, specifically, and he had shipped other articles, he would have lost his insurance. The underwriters were bound to know the articles of trade in the river *La Plata*, and to regulate their premium accordingly. The use of the general term "cargo," was notice to them. Mules and asses are exported from *La Plata* to the *Havana*, the port of destination, and particularly to *Martinico*, one of the points named. To say that a man in such circumstances shall specify his cargo, is to say he shall not insure at all, or to compel him to make up his mind as to what he shall ship, before he wishes to do so: such was the situation of the parties. Now let us look at the policy. The point of destination is left blank, for the very purpose of giving to the party a discretion to go to *Martinico*, or the *Havana*. From *La Plata* to *Martinico*, the great subjects of commerce are mules and jack asses: we say the term cargo embraces such subjects. If they are embraced, it is incumbent on the other side to show a usage, excluding them. They attempted to prove it, and failed, there being proof on both sides: if there is any usage restraining the meaning of the word, they ought to have shown it. That the word cargo includes living animals, see 1 *Marshall*, 93, note (a) *Martin vs. Delaware Insurance Company*, 2 *Wash. Cir. Court Rep.* 255. We admit that *respondentia* and *bottomry* interests are not insured as cargo, because they are not in fact cargo. They are not laden on board the ship. 3 *Kent's Com.* 247. The first answer to the decisions, that goods lashed on deck are not covered by

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the policy is, that the property in this case was not lashed on deck; and the second is, that goods so exposed, are not excluded from the policy, upon the ground that they are not cargo, but because in that situation, they are liable to unusual perils. They must show that goods on deck are not cargo, and that the mules, &c. were on deck, before those decisions will apply. In 11 *Petersdorff*, 377, the goods were on deck, notwithstanding which they were considered cargo, and covered by the policy. A party is not bound to state the condition of his goods, and of course not their character. *Boyd vs. Dubois*, 3 *Camp*. 133. The question then is, if mules are cargo, was it the duty of the party to disclose it. The case in 4 *Pick*. 429, relied on by the appellee, was decided without the authority of a single *American* or *English* case. Although certainly respectable, it is not authority *eo nomine*. The reasoning of the Court is the additional peril. Can this Court base its opinion on such a ground? It would be undoing all that has been done up to the present time. In *Buck and Hedrick vs. The Chesapeake Insurance Company*, 1 *Peters' S. C. Rep.* 151, the insurance was for whom it might concern; and there the policy was made to cover belligerent property, because the Court say the use of those words was an awakening circumstance: so here, the word "cargo" ought to have put the underwriter on his guard. The decision in 2 *Johns. Cas.* 77, shows that the difference of risk is unimportant, whether it proceeds from danger of capture, or any other cause. The principle of the decision in 4 *Pick*. 429, cannot, therefore, be the true one. In 3 *Camp*. 133, damaged hay was put on board, which was liable to effervesce; yet the Court said the assured was not bound to disclose the fact. The answer to the case in 13 *Mass. Rep.* 173, cited on the other side, for the position that we should have proved an exclusive trade in mules, is, that the word "cargo" includes the property, and the other party should have shown an usage, excepting them. The error of the Court below, was in confounding the usage of trading in

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particular articles, with the laws regulating commerce. If the Court are right in saying there must be a long and uniform usage, then there can be no policy on new articles of trade. What would have become of the first policies on gunpowder, fruit, and other perishable articles. We consider the policy a valued one, for \$6000. It is the amount named in it; and there is no principle which says that parties may not put what value they please on the cargo. *Phil. on Ins.* 310.

DORSEY, J. delivered the opinion of the Court.

The first exception presents the question, does that part of the order for insurance, which speaks of the time of the sailing of the *Eugene*, amount to a representation? The inquiry is simply this; is *Allegre* to be understood as asserting a fact or expressing an expectation or belief, founded on facts of which he had knowledge? Give to this order a literal interpretation, and it may well be regarded as the assurance or statement of the fact, that the brig would sail some time during the month of May. But instruments or contracts of this kind are to be liberally construed, and with reference not only to the situation and circumstances of the subject matter of insurance, but also of the parties by whom the insurance is effected. There is nothing in the proof, presented by the record in this cause, to shew that the risk would have been increased by the departure of the vessel in July, instead of May. Had it been so regarded by the underwriters, it is probable that the time of sailing, would have formed one of the stipulations in the policy. In the absence then of any inducement to make a representation of such a character as that insisted on by the appellees: when too, the distance of the port of departure from the place of insurance, was so great as to render it most improbable, if not morally impossible, that the assured could know the precise time of sailing, would it not be more rational, more equitable, to regard the expressions of the insured, rather as the emphatic, confident statement of

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a matter of opinion or calculation, than as a representation in its technical sense. If this order for insurance under the circumstances in which it was drawn, will bear two interpretations, according to the case of *Livingston and Gilchrist vs. The Maryland Insurance Company*, 7 Cranch, 536, "the insurers ought to have asked an explanation and not substitute their own conjectures for an alleged representation." If the insurers, in this case, intended to exact a literal compliance with the statement of the time of sailing in the offer for insurance, they should have made it the subject of a warranty, or have informed *Allegre* that they relied on it as a representation. Had the statement been, that the vessel *had sailed*; and it were a fact of which its knowledge could be imputed to the insured, it might perhaps be regarded as a representation. But in this case a future event is spoken of, in its nature contingent, and of which the party speaking could not possibly possess any certain knowledge. As supporting the view here taken of this subject. *Phil. Ins.* 83, 84. *Christie vs. Secretan*, 8 T. R. 192. *Hubbard vs. Gover*, 3 Campb. 312. *Bowden vs. Vaughan*, 10 East 415. *Brice vs. Featherstone*, 4 Taunt. 869. and *Jendivine vs. Slade*, 2 Esp. R. 572, may be referred to. Also the very strong case of *Rice and others vs. The New England Marine Ins. Com.* 4 Pick. Rep. 439, where Chief Justice *Parker*, in delivering the opinion of the Court, emphatically states: "We think that the statement of the day on which a vessel will sail, is substantially nothing more than stating an expectation that she will sail on that day." "The most positive intentions to sail on any future day, amount only to a strong expectation, for it must depend on the elements and other causes affecting the sailing of vessels, whether such intention shall be executed or not. And if the time of sailing be material to the risk, the insurer would be as likely to require a warranty, that the vessel would sail or had sailed on the day proposed, if it were stated positively, as if stated only as an expectation."

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In opposition to the above references must perhaps be regarded the case of *Dennistown and others vs. Little and others*, recently decided on appeal to the House of Lords, and reported in 3 *Bligh*, 202. But of this case it may be said, that the grounds of the decision are unsatisfactory, and indistinctly stated: and that viewing it even in the light of conclusive authority in this case as to the question adjudicated, it is by no means decisive of the point now under consideration, as presented by the facts in this record. In that case the statement was, the *Brilliant* will sail on the 1st of May: the fact was that she had sailed on the 23d of April, preceding, and was at that time a "missing vessel." The assured there appeared as owner as well of the vessel as of the cargo, both being covered under the same policy. And upon this last ground the *Lord Chancellor* mainly rests his opinion: and draws the distinction between the case before him, and that of *Bowden vs. Vaughan*, the decision in which he recognizes and sanctions. In the case before us, the policy was solely on the cargo; and the underwriters had no reason to presume, that the owner of the cargo had any interest in or control over the vessel. The question now to be settled, therefore stands unaffected by the decision in 3 *Bligh*.

The order for insurance as regards the time of sailing being deemed no representation, the instruction of the Court to the jury, in the appellants first bill of exceptions, was wrong upon two grounds. *First*, because it was wholly immaterial to the issue in the cause whether the risk were materially increased or not, by the sailing of the brig at a different time from that stated in the order for insurance, such statement being no representation. *Secondly*, because the Court submitted it to the jury, to find the fact, that the risk had been materially increased, when no testimony whatever had been adduced on that subject, to warrant the jury in drawing such a conclusion.

To the opinion of the Court, in the appellants second bill of exceptions, but little opposition was made in the argu-

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ment, and to the admissibility of the testimony there offered, we are aware of no well founded objection.

We concur with the County Court in their refusal of the prayers of the appellants, set forth in their third bill of exceptions. If proof of facts were requisite to demonstrate the far greater perils, to which a live cargo is exposed in a sea voyage than a dead cargo; the result of the adventure in controversy, and the testimony given in this cause, are most conclusive; 106 mules and 4 jackasses were shipped on board the *Eugene*. By tempestuous weather, which to a dead cargo would have occasioned no injury, 94 mules and all the jackasses were destroyed. On board the *British brig Palmyra*, 170 or 180 mules were laden, on a voyage from *La Plata* to *Havana*: on her arrival at the port of destination, but 33 were alive; 4 or 5 of which soon after died: a common cargo exposed to such perils would in all probability have escaped uninjured. In transporting a cargo of live stock, a great portion of it is stowed upon deck, and consequently subjected to casualties, from which a cargo under hatches is wholly exempt. Indeed so much greater are the estimated risks to goods on deck, than to those in the hold, that double the premium of insurance is demanded for the former, that there is for the latter: And on account of this great diversity in the amount of premium, a policy, on "cargo," or "goods and merchandize," will not cover articles which are stowed upon deck. If the vessel be wrecked or stranded, the chance of saving a dead cargo, is far greater than that of saving a live cargo. In fact, the disadvantages to the assurer attendant on the latter risk, which are not incident to the former, are so numerous and obvious that they need not be enumerated. In compacts then of which good faith and fair dealing are the very essence; where it is said to be the duty of the assured to communicate "every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it,"

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ought not the insured to be informed of it, where live stock are the subject of insurance? There is no rule of law or decision of any Court of this State or elsewhere, as far as our researches have extended, which excuses the insured from making such a communication: commercial policy enjoins it; justice demands it; as far as the testimony in this case goes, the usages of underwriters require it, and the highest judicial tribunal in a sister State, hath adjudged it to be indispensable. Should we then hesitate to adopt it? An uniformity of decision among the several States of the Union, on subjects of this nature, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce us to sanction the principle established in one of the most enlightened and commercial States in the Union, that a policy on cargo, goods or merchandize, will not cover live stock. The adjudication alluded to, is reported in 4 *Pick. Rep.* 429. *Talcot Woolcot et al. vs. Eagle Insurance Company.* If it had been in proof that mules or live stock were the only articles of exportation from *La Plata* to *Martinico* and the *Havana*, this would give a new aspect to the case. It would not then be necessary for the insured to notify the insurer of the character of the cargo. That fact having already been made known to him from the nature of the trade, of which the law presumes him to have knowledge. These remarks are made, as applicable to the prayers of the appellants, and with reference to the general principles of the law of insurance, not upon the rights of the appellants resting upon any usage of trade prevailing in the city of *Baltimore*.

Having approved of the Court's refusal to grant the two instructions asked for in this *third* bill of exceptions, it remains to be considered whether there be any error in the opinion delivered by the Court, of which the appellants have cause to complain. That there is, to us appears obvious. The Court undertook to determine the question of fact, that the appellants were guilty of a concealment fatal

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to the policy, provided the jury believe that the risk was materially increased by the cargo being of mules, instead of a dead cargo, "and that this material increase of risk, was the only question open for the consideration of the jury." In doing so, they threw out of the case the testimony offered by the appellants, "that the term cargo, in the aforesaid order for insurance, would, according to the mercantile understanding and usage of trade among the insurers, and merchants of *Baltimore*, be considered as covering mules and jackasses;" thus, in effect, determining a controverted matter of fact, of the truth of which contradictory evidence had been offered. If the facts had been left to the jury, as they ought to have been, and they had found that there did exist such a mercantile understanding and usage of trade in *Baltimore*, upon the whole evidence offered in the cause, it was competent for the jury to have rendered a verdict for the appellants, notwithstanding the shipment of mules materially increased the risk which would have been incident to a dead cargo.

We concur with the County Court in their opinion in the appellants *second* bill of exceptions, but dissent from their opinions in the *first* and *third* exceptions.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ADM'RS.—June, 1830

Where actions upon two policies of insurance for the same voyage, one upon the cargo, the other upon the vessel, were tried before the same jury at one time, proof that the word cargo, in the one policy, did not, according to the mercantile interpretation and usage of the place where the policies were effected, cover a shipment of mules, is not evidence that the other policy on the vessel is a nullity. A perilous cargo to the insurer does not necessarily, increase the perils of the ship owner.

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It is true, as a general rule, that in an order for insurance upon a vessel, it is not necessary to state the nature or condition of the cargo designed to be transported. If the underwriters desire information upon that subject, it is for them to ask it.

In such case, the underwriter is presumed to be acquainted with the ship-owner's rights. In the absence, therefore, of fraud, or evidence to vary the general rule, the payment of a loss under the policy, cannot be resisted upon the ground that a larger premium would have been required for the insurance of a vessel employed in transporting mules, than was stipulated to be paid under a contract which did not mention the nature of the cargo.

APPEAL from *Baltimore County Court*.

This was an action of *Covenant* on a policy of insurance brought by the appellees' intestate against the appellants. The declaration stated, that the policy was made on the 22d of April, 1820, between the then plaintiff and the defendants, whereby the plaintiff, as well for himself as for and on account of all and every other person or persons to whom the said did or might appertain, in part or in whole, did make insurance, lost or not lost, at and from *Rio de la Plata* to *Havana*, with liberty of touching at *Martinique*, \$5000 upon the body, tackle, &c. of the brig called the *Eugene*, whereof was master for that voyage, *Chalumeau*, &c. Beginning the adventure upon the said vessel, &c. at and from *Rio de la Plata*, and so should continue and endure until the said vessel be arrived at the said ports of *Martinique* and *Havana*, &c. The declaration, in the usual form, proceeded to state the nature of the policy, and averred that at the time of making the policy, *Charles A. Chalumeau* was the owner of the said brig, and that the insurance was made by the plaintiff, in trust for the use and benefit of the said *Chalumeau*. That on the 1st of July, 1820, the said brig, being tight, staunch and strong, sailed from *Rio de la Plata*, on her intended voyage towards *Martinique* and *Havana*, and whilst so proceeding, on the 15th of July, in year aforesaid, on the high seas, the said brig was, by the perils and dangers of the seas, and by

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stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, damaged, &c. and the said brig thereby wholly lost to the said *Chalumeau*, &c. The death of the plaintiff was suggested, and his administrators, (the appellees) were made plaintiffs. The defendants pleaded *non infregit conventionem*, and issue was joined.

1. The plaintiff at the trial gave in evidence the policy of insurance upon which this action was brought, dated the 22d of April, 1820, whereby the defendants insured the plaintiff's intestate for the concerned, at and from *Rio de la Plata* to *Havana*, with liberty of touching at *Martinique*, \$5000 upon the body, tackle, &c. of the brig called the *Eugene*, whereof was master for the voyage — *Chalumeau*, or whoever else should go master, &c. Beginning the adventure upon the said vessel, tackle, &c. at and from *Rio de la Plata*, and so should continue and endure until the said vessel be arrived at the ports aforesaid. The policy then proceeded in the form of that used in the case of the same *plaintiffs* against the *Maryland Insurance Company*, omitting the clause respecting the survey of the vessel. By a memorandum signed by the president, on the 8th of June, 1820, the defendants stated that they would consider the above insurance as made at and from *Monte Video* to *Havana*. The plaintiffs also gave in evidence, that at the time the said policy was effected, the vessel was in every respect seaworthy, and arrived in the river *La Plata* at *Monte Video*, and there commenced loading on board her a cargo of mules and jackasses on the 5th of June, 1820, and having taken the same on board, sailed from the river *La Plata* on the 12th of July, of that year, for *Havana*; and during the progress of the voyage, by storms and tempests, the said vessel was compelled by necessity to put into *Rio de Janeiro*, where the vessel was regularly surveyed and ascertained to be totally unworthy of repairs, and condemned and sold; and the assured, in due time, duly made an abandonment of the vessel insured in due form to the

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defendants. The plaintiffs further gave in evidence, that the said vessel was an American vessel, and belonged to *Charles A. Chalumeau*, for whose account the insurance was made; and they read in evidence, by consent, the protest made and sworn to by the master, mate, and two of the seamen of the brig *Eugene*, before the vice consul of the *United States of America*, for the port of *Rio de Janeiro*, on the 19th of August, 1820, detailing minutely all the particulars of the shipment of the cargo on board the vessel—her sailing on the voyage, and the loss sustained. The master at the same time requiring a regular survey to be made of the vessel, &c. The plaintiffs also read in evidence sundry depositions of witnesses, taken and returned under a commission issued for that purpose from *Baltimore County Court*, to certain persons, named as commissioners, at *Rio de Janeiro*. As the questions decided by the Court below, do not appear to depend upon this testimony, it is omitted. The plaintiffs also gave in evidence, that at the time of, and long before, and since this policy was effected, mules and jackasses were an ordinary article of merchandize, and were shipped in various directions as merchandize from the river *La Plata*. They further gave in evidence, by *Henry Armstrong* and *James Bosley*, the same witnesses who proved the foregoing facts, that to their knowledge, mules are an ordinary article of exportation from *Rio de la Plata* to *Martinique*, *Santa Cruz*, and other Windward Islands; but that they did not, within their own knowledge, know of mules being carried to *Havana* from the river *La Plata*—never having been at *Havana*. And also proved by the said witnesses, that they never knew of any other cargo being carried from the river *La Plata* to the *West Indies*, than jerked beef or mules.

The defendants then read in evidence, by consent of the plaintiffs, the following order for insurance, upon which the policy above mentioned was made: “*Baltimore*, April 22d, 1820. Gentlemen—Insurance is wanted for account

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of the concerned, at and from *Rio de la Plata* to *Havana*, with liberty of touching at *Martinico*, on the brig *Eugene*, *Chalumeau*, master, valued at \$5000. Said brig left the Capes, bound out, on the 12th of January last. It is therefore presumed that she will sail from *Rio de la Plata* in the course of the next month. What will be the premium? *J. B.A. Allegre.* "5 per cent." "Agreed, *J. B.A. Allegre.*"

They also offered to read the following paper: "*Baltimore*, August 15th, 1820. Gentlemen—By a letter from captain *Chalumeau*, of the brig *Eugene*, it is mentioned that she will sail on or about the 5th June, direct for *Havana*. I make you this declaration in order of altering the policy of insurance effected at your office in regard to the time of the sailing of the above vessel. *J. B. A. Allegre.*" "Agreed." It was admitted that the last mentioned paper was carried to the office of the defendants about the time it bears date, by the said *Allegre*, in whose handwriting it was admitted to be. That it was submitted to the board, and agreed to by them, and the word "agreed," entered thereon in his presence. To the admissibility of which paper in evidence the plaintiffs objected, and prayed the opinion of the Court, that the said paper was not legal and proper evidence. But the Court, (HANSON, A. J.) was of opinion that the said paper was admissible, and permitted it to be read to the jury, for the purpose of showing whether the said *Allegre* made the statement in the order of insurance as to the sailing of the said vessel, concerning his actual knowledge as to the time of said sailing, but not for the purpose of showing a change of the original contract between the parties. The plaintiff excepted.

2. The plaintiffs and defendants then offered in evidence that which is stated to have been offered by them in the *third* bill of exceptions, taken in the before mentioned case of the same plaintiffs against the *Maryland Insurance Company*; (*see ante* 140) and the plaintiffs made the same prayers to the Court, and their direction to the jury, in this case, as they made in the above mentioned case. Which

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directions, and each of them, the Court refused to give. The plaintiffs excepted.

3. The defendants then prayed the Court to direct the jury, that if they find from the evidence, that according to the usage and mercantile understanding among underwriters and insurance companies in *Baltimore*, where both plaintiffs and defendants resided, a general order for insurance on a vessel is not considered as comprehending a vessel employed in transporting live stock or animals, and that a larger premium is always required by insurers, when an insurance is effected on a vessel that is intended to be employed in transporting a cargo of live stock or animals, than an ordinary cargo of dead merchandize, then the plaintiffs are not entitled to recover in this cause, as the order for the insurance, on which the policy is founded, does not comprehend, according to the mercantile usage and understanding of the same, a vessel employed in transporting a *cargo of mules and jackasses*. Which direction the Court refused to give; but delivered the same opinion and instructions to the jury, as were given by the Court on the prayers of the plaintiffs in the *third* bill of exceptions taken in the case preceding, (*ante* 136) of the same plaintiffs against the *Maryland Insurance Company*. The defendants excepted.

4. The defendants then prayed the Court to direct the jury, that if they find from the evidence given, that a larger premium would have been required by the defendants for an insurance of a vessel to be employed in transporting a cargo of mules and jackasses on the voyage insured, than was stipulated to be paid by the policy in this case, then the risk is materially increased, and the plaintiffs are not entitled to recover. Which direction the Court refused to give. The defendants excepted; and the verdict and judgment being against them, they appealed to the Court of Appeals.

This case was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

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Meredith, for the appellants, (the defendants below) contended, that the prayers of the defendants in the *third* and *fourth* bills of exceptions, ought to have been granted. This question is to be treated as a question of concealment. It was the duty of the assured to disclose, that the vessel was to be engaged in the transportation of live stock. *Park on Ins.* 287. *Carter vs. Behm*, 3 *Burr.* 1905. The inquiry is, would the fact concealed, effect the premium? If it would, the concealment destroys the policy. *Harrison's Index*, 738. 1 *Marshall*, 471. 1 *Dow*, 324. The premium would have been increased, if it had been known that mules and jackasses were to constitute the cargo. Nothing could excuse the assured, but evidence of the usage of trade, and in this case there is no such evidence.

Taney, (Attorney General) and *Mayer*, for the appellees.

No attempt was ever before made, to compel the assured to make known the nature of the cargo which was to go in his ship. If he is bound in any case, he is bound in all cases, and this cannot be contended. It is the peculiar province of ships to carry cargo, and when their owners ask for insurance, it is understood they are to enjoy this privilege. They referred to *Philips on Insurance*, 92. 2 *Wash. Cir. Court Rep.* 255.

Wirt, for the appellant, in reply.

The object of the prayer in the *fourth* exception, was to get an instruction to the jury, that any circumstances which would increase the premium, are material, and must be disclosed. A party is bound to disclose the nature of the cargo when it exposes the ship to peculiar peril. In this case the voyage was direct from *Monte Video* to *Havana*; there was no intermediate port. It has been asked how the assured could know that the cargo was to be a live one. He could not but know that such a cargo might be shipped. That it is necessary to state the service in which the ship

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is to be employed, and the concealment will destroy the policy; he referred to *Marshall*, 471, 467, (note.) *Harrison's Index*. 738. 1 *Doug.* 97.

DORSEY, J., delivered the opinion of the Court.

With the questions decided by the Court below, on the appellees bills of exception, this Court have no concern. Their duty is confined to an examination of the points determined against the appellants, and for the revision of which their exceptions were taken. It is apparent from the records, that the two cases of *Allegre's Administrators vs. The Maryland Insurance Company*, (ante 136) and *The Chesapeake Insurance Company vs. Allegre's Administrators*, were both tried in the County Court at the same time, and before the same jury. Without adverting to this circumstance, it would be difficult to account for the introduction of much of the evidence embraced in the bills of exceptions; in the latter case, it being wholly irrelevant to the issue for trial before the jury. The instructions, therefore, which were prayed for by the appellants, must be predicated only on that portion of the testimony which is applicable to the issue in this cause. The proof, then, of mercantile interpretation, or universal understanding amongst insurance companies and underwriters in the city of *Baltimore*, that the order for insurance of the cargo of the *Eugene*, or goods and merchandize on board of her, would not cover mules or live stock, is not evidence to prove that the policy on the brig is a nullity, because the underwriters were not apprised that she was to be employed in the transportation of mules. A perilous cargo to the insurer, does not necessarily increase the perils of the ship owner. No testimony had been adduced to show, that in the city of *Baltimore*, the order now in question would not sustain a policy in the mule trade. The Court, therefore, were right in refusing to instruct the jury, (as required by the appellants in their *first* bill of exceptions) "that if they find, from the evidence, that according to the usage and mercantile understanding among un-

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derwriters and insurance companies in *Baltimore*, where both plaintiffs and defendants resided, a general order for insurance on a vessel, is not considered as comprehending a vessel employed in transporting live stock, or animals," &c. that the plaintiffs were not entitled to recover. To have granted such an instruction, would have been to have authorised the jury to find a fact, of which no testimony legally sufficient to warrant such a finding, had been submitted to their consideration. The refusal of the Court below being sustained, and their opinion conceding to the appellants more than they had a right to demand, the *first* exception furnishes no ground for reversing the judgment.

In rejecting the application of the appellants, as stated in their *second* bill of exceptions, the County Court were also right. As a general rule, it is true that it is not the duty of him who seeks insurance on his vessel, to state to the underwriters the nature or condition of the cargo which he designs to transport. If they desire information on the subject, it is for them to ask it. It would be carrying the doctrine of concealment far beyond its present limits, if, in a case like the present, where granting the instruction assumes as facts established before the jury, (the plaintiffs below having offered evidence to that effect) "that a cargo of mules does not increase the risk of the vessel;" that mules are the known and only article of trade between *La Plata* and *Havana*, except jerked beef, the Court should determine, that, if knowing that a cargo of mules were to be laden on board the brig, the insurers would have demanded a higher premium, then the policy is void; although it might be, that the premium received were double that which would have been required on an insurance on beef, and was an averaged premium, upon a fair calculation, of the probabilities of the nature of the cargo, derived from a knowledge of the trade, with which the underwriters are presumed to be acquainted. No imputation of fraud has been cast upon the assured, or him whose interests he represented. The instruction sought, is not predicated on that basis.

JUDGMENT AFFIRMED.

CHARLES GWYNN vs. JONES' LESSEE.—*June, 1830.*

By the act of 1766, ch. 14, sec. 2, conveyances to pass an estate in lands for above 7 years, are required to be enrolled within six months from their date. The enrolling officer is directed immediately, upon the receipt of any such deed, to endorse thereon the time of his receiving it—to enrol it, and, “on the back of every such deed, in a full, legible hand, make a certificate of such enrolment, and the time of making it.” An original deed of that character, cannot be read as evidence of title, without offering proof of the hand-writing of the officer who endorsed it.

The common law restrains the assignment of an entry for a condition broken, where, after the forfeiture incurred, the estate may continue; but it allows it where the violation of the condition puts an end to the estate of the particular tenant.

It is a case of constant occurrence, where a grantor, having a right of entry on land, conveys it to another, and therewith, necessarily, the power to maintain an Ejectment for it.

Mere continuance in a possession, which originated under a lease from the Lord Proprietary of this State, created in conformity to the act of 1704, ch. 16, sec. 5, after the reversioner is entitled to re-enter for a condition broken, and before the original term had expired by lapse of time, is not adverse to the reversioner's right to re-enter, nor will limitations begin to run under such circumstances.

Where a possession commenced rightfully, and with the consent of the owner, nothing is to be presumed to make it adverse. Mere holding over, after the term ended, is not evidence of an adverse possession; and the possessor will be regarded as the tenant at will of the landlord, unless he can show that, since the expiration of the lease, he has held forcibly, or has acquired a title paramount to that under which possession was originally taken.

APPEAL from *Harford County Court.*

This was an action of *Ejectment*, brought by the appellee (the plaintiff in the Court below) against the appellant, (the defendant in that Court) for a tract of land called *Expectation*. The defendant pleaded not guilty, and took defence on warrant. Plots were made and returned.

1. At the trial, the plaintiff proved to the jury, that one *James Norris* was seized in fee of the tract of land called *Expectation*, in the declaration mentioned, on the 9th of June, 1774, and also gave in evidence the following writ of *ad quod damnum*, the inquisition, and return thereon, with

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the lease of that date thereon, made to one *Thomas Saunders*, which said lease, and other proceedings, under the *ad quod damnum* aforesaid, were regularly attested, under seal, and are as follows: “*Maryland ss. Frederick*, absolute lord and proprietary of the provinces of *Maryland* and *Avalon*, lord baron of *Baltimore*, &c. To the Sheriff of *Baltimore* county, greeting: We command you, that by the oaths of twelve honest and lawful men of the county, by whom the truth of the matter may be better known, you diligently inquire if it be to the damage of us, or others, if we grant unto *Thomas Saunders*, of *Baltimore* county, twenty acres of land, lying on a run of water called *Winter's Run*, in *Baltimore* county, aforesaid, viz: ten acres on one side of such run, and ten acres on the other side of such run of water, together with liberty to take, fall, cut down and carry away, either by land or water, any wood or timber fit to build a mill, other than timber fit to split into clapboards, upon any the lands next adjoining to the said twenty acres of land lying on each side of said run of water, at *Winter's* run aforesaid, in the county aforesaid: and if it be to the damage and prejudice of us, or others, then to what damage and prejudice of us, and to what damage and prejudice of others, and of whom, and in what manner, and how, and of what value they are, by the year, according to the true value thereof, now before any other improvement of the said twenty acres of land; and who are the present possessors of the said twenty acres of land, and what lands and premises remain to the present possessors over the said twenty acres; and if the said land, remaining to the present possessors, over the said twenty acres, will suffice to uphold their manor, viz: the sixth part of their manor, allotted them by the conditions of plantations, for the demise, before the alienation, so as the county, by the alienation aforesaid, in default of the present possession, more than was want, not to be charged, and grieved, and the inquisition thereupon openly and distinctly made to us, in our Chancery, under the seal

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and the seals of them by whom it was made without delay, send. Witness our trusty and well beloved *Horatio Sharpe*, Esquire, Chancellor of our said province, this 13th day of April, in the 13th year of our dominion, A. D. 1764. *Rheverdy Gheselin, Reg. Cur. Can.*”

“*Baltimore County*, ss. This is to certify, that at the execution of a writ of *ad quod damnum*, the inquisition of which is hereto annexed, I have surveyed and laid out in the name of *Thomas Saunders*, of *Baltimore county*, on a run called *Winter's run*, ten acres on one side, and ten acres on the other side of said run, beginning at a bounded red oak, standing on the west side of *Winter's run* aforesaid, it being the third bounded tree of a tract of land called the *Expectation*, and running, &c. containing and laid out for twenty acres, more or less. *Wm. Smith, D. S. H. C.*”

“This inquisition indented, and taken upon *Winter's run*, descending into *Bush river*, in *Baltimore county*, this second day of July, in the year of our Lord, seventeen hundred and sixty-four, before me, *Aquila Hall*, high Sheriff of the same county, by the oaths of *James Maxwell*, &c. twelve honest and lawful men of the county aforesaid, who being sworn by virtue of the writ hereunto annexed, to inquire into the exigency thereof, upon their oaths do say: that if the right honorable the lord proprietary grant unto *Thomas Saunders*, of *Baltimore county*, twenty acres of land, lying on the said *Winter's run*, descending into *Bush river*, as aforesaid, viz: 10 acres on each side of the said run, bounded according to the metes and bounds mentioned in the certificate of survey hereunto prefixed, made by *William Smith*, surveyor of the county, as may be most convenient for the building a water mill at the place above mentioned, in *Baltimore county* aforesaid, it would not be to the damage of the honorable the lord proprietary, as being no manor; and that the said 20 acres of land, is of the yearly value of one pound sixteen shillings, current money, without further

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improvement and no more; and that the said 20 acres of land is part of two tracts of land, viz: 10 acres, one moiety thereof lying on the west side of the aforesaid run, is part of a tract of land called the *Expectation*, and *James Norris* is the present possessor, and is thereby damaged the sum of fifteen pounds, and the yearly rent thereof, is eighteen shillings current money, and the other 10 acres, the other moiety thereof, lying on the east side of the aforesaid run, is part of a tract of land called the _____ being the *Glebe of Saint John's Parish*; and the vestry of *Saint John's Parish*, aforesaid, are the present possessors, and they are thereby damaged the sum of £20 current money, and the yearly rent thereof, is eighteen shillings current money, and there still remains sufficient to each of the present possessors to uphold their manor, viz: one sixth part thereof. In testimony whereof, as well the sheriff as the jurors aforesaid, have hereunto set our hands and seals, the day and year above written. Signed and sealed by the sheriff and jurors."

"*Maryland, to wit*: The right honorable *Henry Harford*, Esquire, lord and proprietary of the province of *Maryland*: Whereas, *Thomas Saunders*, of *Baltimore* county, hath purchased out of our Court of Chancery, within our said province, our writ of *ad quod damnum*, directed to the sheriff of *Baltimore* county, commanding him, &c. (here the lease recited the writ:) And whereas the aforesaid sheriff at the instance and request of the aforesaid *Thomas Saunders*, did return into our said Court a certain inquisition, indented and taken before him in the county aforesaid, on the second day of July, in the year of our Lord 1764, by the oaths of twelve honest and lawful men of the county aforesaid, who upon their oath did say, &c. (here the lease recited the inquisition and return:) Now know ye, that we are contented and pleased to grant, and by these presents do demise, grant, and to farm, let unto the aforesaid *Thomas Saunders*, his heirs, executors and administrators, the aforesaid 20 acres of land, to build a water mill, together

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with free egress and regress to the said water mill, either by land, through any man's land next adjoining to the said 20 acres of land, or else by water, together with liberty to take, fall, cut down and carry away, either by land or water, any wood or timber fit to build a mill, other than timber fit to split into clap-boards, upon any of the lands next adjoining to the said 20 acres. To have and to hold the said 20 acres of land, and premises aforesaid, unto him, the said *Thomas Saunders*, his heirs, executors and administrators, from the date of the inquisition aforesaid, unto the full end and term of eighty years then next ensuing, to be complete and ended. Yielding and paying therefor, unto our heirs and successors, the same rents, fines and services, as are reserved due and payable unto us for the said 20 acres, and also yielding and paying the yearly rents in the above inquisition set forth. Witness, *Richard Lee*, President and Chancellor of our said province of Maryland, this 9th day of June, in the third year of our dominion, 1774." True copy—Test, *Ramsay Waters*, Reg. Cur. Can.

And the plaintiff also gave in evidence, that *Saunders* then entered into possession of the lands in said lease described, as the same is located on the plots in this cause. That he afterwards built a mill thereon, which went into disuse in the year 1785. That the said *Thomas Saunders*, on the 1st day of December, 1786, conveyed the land in the said lease described, unto *John Lee Webster*, who, upon the death of said *Saunders*, in the year 1792, took possession of the same and held it until his death. And that the said *Webster*, by his will, in 1795, devised the same unto his son, *Isaac Lee Webster*, who took possession thereof, and by him and his tenants, of whom the defendant is one, the same hath been held in possession to this time, and by the defendant for fifteen years before the institution of this suit.

Thereupon the *defendant* offered evidence that the said *Thomas Saunders* had, by actual enclosure, held the possession for several years before his death, of all the land

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contained without the location of his possession, as made on the plots in this cause; that part of the fences which formed the said enclosure and possession, were shortly after his death moved to where they are now located on the plots in this cause, by the defendant, as his possession by indented lines, and as his defence in this case; that to this extent, possession by actual enclosures, has always since so remained; that the said *John Lee Webster*, and *Isaac Lee Webster*, his tenants, and the defendant as one of them, actually held and possessed all the land within the said enclosures of possession so located, for which defence is made in this action.

Whereupon the plaintiff further gave evidence to the jury, that the said *James Norris*, by his will in August, 1798, devised 100 acres of the land in the declaration mentioned, including the part so held by the defendant, to his son *James Norris*, in fee, who entered into, and possessed the same, except the part aforesaid located as the possession of the defendant, and the said *Webster* and *Saunders*; that the said last mentioned *James Norris*, executed a deed (of which the following is an office copy,) to *Josiah S. McComas*, and the said *Josiah S. McComas* executed the deed following to *Benjamin G. Jones*, lessor of the plaintiff.

The deed from *James Norris*, the son, to *Josiah S. McComas*, was dated 9th July, 1807, and in consideration of the sum of £150, “granted, bargained, sold, aliened, enfeoffed, and confirmed unto him, the said *Josiah*, his heirs and assigns, part of a tract of land called *Expectation*, lying on the lower end of said tract, containing 100 acres, and all the estate, right, title, and interest whatever, of him, the said *James Norris*, both at law and in equity, to the said tract of land and premises, hereby bargained and sold, or meant, mentioned, or intended so to be, and every part and parcel thereof.” This deed was duly acknowledged and recorded, as appeared from the certified copy, under the seal of the clerk of *Harford County Court*.

The deed from *Josiah S. McComas* to *Benjamin G.*

Jones, was dated 21st February, 1818, and in consideration of the trusts reposed in him by a certain *James Norris*, and the payment of *one dollar*, granted, bargained, sold, aliened, released and confirmed, unto the said *B. G. J.* and his heirs, the same land and interest as described in the preceding deed. This was an *original deed*. There was the usual certificate of acknowledgment before two of the justices of the peace, and it was in fact endorsed on the back as follows: "received and recorded the 21st day of February, 1818, in liber H. D. No. 1, folio 227, one of the land record books of *Harford* County Court, and examined by *Henry Dorsey*, Clerk." And also proved that the said *McComas* and *Jones*, took possession under said deeds, respectively, of the land mentioned therein, except the part so as aforesaid mentioned, in the possession of the defendant. The defendant then prayed the opinion and direction of the Court, to the jury, that if they believed the matters so given in evidence, that then the length of possession so holden by the defendant, and those under whom he claims, doth in law bar the plaintiff's recovery of the land, included within the lease to *Saunders*, being the land condemned as aforesaid; but the Court [ARCHER, Ch. J.] refused such opinion and direction. The defendant excepted.

The plaintiff then offered evidence, that in the year 1805, the said *James Norris*, the younger, being on the land so occupied by the said defendant, did enter thereon, and did demand of the defendant the surrender to him of the said land. And that the said defendant refused to surrender the possession of the same to the said *Norris*. Whereupon the defendant objected, that the entry and demand so made, were insufficient to entitle the plaintiff to recover, and prayed the opinion of the Court, and their direction to the jury, that if such entry and demand be necessary in law, that the same ought to be made by the lessor of the plaintiff, after the deed of conveyance before mentioned made to him by said *McComas*, and before this action brought; but the

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Court, [ARCHER, Ch. J.] refused such opinion and direction, and directed the jury, that the entry and demand so made by the said *James Norris*, was a sufficient entry and demand. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., EARLE, and MARTIN, J.

The following are extracts of so much of the two acts of Assembly, as were considered in this cause:

By the act of 1704, *ch. 16, sec. 5*, it was enacted, that no person having, or that hereafter shall have obtained, any grant for any lands whereof such person or persons are not the real owners or possessors thereof, and whereupon he, she, or they have already built, or shall hereafter build a water mill, as the law hath before directed, shall have any right, title or claim, to any land granted for any time or term whatsoever, after such mill by him or them already built as aforesaid, or that shall hereafter be built, shall be casually broke, or gone to decay as aforesaid, other than two years from the new erecting, building, finishing and repairing of such mill as aforesaid; but that in all and every case where any person or persons that have already built, or shall hereafter build, any water mill, which are, or that hereafter shall be broke, or gone to decay, as aforesaid, and shall not within two years after the publication hereof, or within two years after such mill shall become broke, or gone to decay as aforesaid, cause the same to be new builded, repaired and finished as aforesaid, it shall and may be lawful for the real owner or owners for such land, to such person or persons so granted as aforesaid, to re-enter upon the same; and in case such person or persons shall refuse, or deny to give the owner or owners of such land as aforesaid, peaceable and quiet possession thereof, such owner or owners shall, and may recover his right to the same by ejectment, or otherwise

as the law directs; any thing in this act contained to the contrary notwithstanding.

By the act of 1766, *ch.* 14, *sec.* 2, conveyances in order to pass lands, are directed to be enrolled in the records of the same county where the lands lie, or the Provincial Court, within six months after the date of such deed or conveyance; and the Clerk of the Court shall immediately, upon the receipt of such deed, endorse thereon the time of his receiving the same, and enroll the same, &c. And “shall on the back of every such deed or conveyance, in a full, legible hand, make a certificate of such enrollment, or the time of making it, and also of the folio of the book in which the same shall be enrolled, and shall to such certificate set his hand.”

R. W. Gill, for the appellant, contended,

1. That the lessor of the plaintiff has shewn that *James Norris* was seized of the land in controversy on the 9th of June, 1774. 2. That the same land was condemned under a writ of *ad quod damnum*, and on the 9th of June, 1774, leased by competent authority for a term of 80 years, to a certain *Thomas Saunders*, under whom the defendant below claimed. 3. That this term not expiring before the year 1854, the lessor of the plaintiff to recover before that period, must shew a forfeiture of the land enuring to him. 4. That by the act of 1704, *ch.* 16, by which the land was condemned, the only forfeiture of the lease to *Saunders*, is the mill being casually broken, and going to decay, and not repaired within two years. 5. That the plaintiff's evidence, that the mill erected on the land in controversy, had gone into disuse, does not establish a forfeiture of the lease. 6. That under the true construction of the act of 1704, *ch.* 16, the right of entry mentioned in the 6th section, is exclusively reserved to the real owners of such land, at the time of the right accrued. 7. That *James Norris, Jr.* under whom the lessors of the claim having but a naked right of entry to the lands in controversy, and

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for a condition broken, could not assign that right, and therefore the County Court erred in refusing to instruct the jury, that the entry and demand of *James Norris, Jr.* in the year 1805, was insufficient to entitle the plaintiff to recover. 8. That the right to re-enter on the lands in controversy, if it accrued at all, accrued in the year 1787, and this suit not having been commenced until the year 1818, the right of entry for that forfeiture was barred by the defendant's actual possession. 9. That as *Jones* claims under a deed, the *original* of which was given in evidence, and no proof was offered, that the endorsement on the back of the said deed, purporting to be the endorsement of the Clerk of *Harford* County Court, was, in fact, his endorsement, said deed was inoperative to pass any estate to said *Jones*, and therefore *Jones* having no title could not avail himself of *Norris's* demand and entry. He referred to the act of 1704, *ch. 16, sec. 5. Dappa vs. Mayo, 1 Saund. 413. Ib. 287, (a) note 16. Hammond and Ridgely, 6 Harr. and Johns. 245. 2 Cruse Dig. 553, sec. 28. Runnington on Ejectment, 60.*

Flusser, for the appellee, cited, 1 *Plowden*, 363. 6 *Bac. Abr.* 383. *Coke Lib. sec. 380. 1 Bac. Ab. 638. 2 Blk. Com. 155. Coke. Lit. 203 (b) note (1) 7 Com. Dig. (d) 70. 17 Viner placitum, 1. 1 Shep. Touch. 152. 1 Saund. 213. 3 Cruse Dig. 549. 2 Stark. Ev. 507, 508. Jackson vs. Parker, 3 Johns. Cases, 124. Jackson vs. Thomas, 16 Johns, 293. 1 Cain. Rep. 400.*

EARLE J. delivered the opinion of the Court.

This case must be reversed, and returned to *Harford* County Court on a *procedendo*. The deed from *McComas* to *Jones*, is a link in the chain of the plaintiff's title, and the original was read without offering proof of the hand writing of the Clerk, who endorsed the time it was received into the office, which was indispensable to laying it before the jury. The omission, it is likely, was not observed at

the trial, but as it is seen by us, and being a case before the act of 1825, *ch.* 117, we must notice the error, and make it the ground of a reversal. 7 *Harr. and Johns.* 42.

As this case is to be tried again, and we have to act upon the bill of exceptions in the record, it becomes our duty briefly to assign our reasons for concurring in the opinions expressed by the Judge who signed it.

The lessor of the plaintiff claims the disputed land under *James Norris*, the elder, who was the undisputed owner of it in the year 1774, when it was granted to *Thomas Saunders*, by the *lord proprietary*, under the *ad quod damnum* law of 1704, *ch.* 16, for a term of 80 years, which from efflux of time, is not yet expired. The defendant claims under *John Lee Webster*, to whom *Saunders* assigned his lease in the year 1786. The mill erected thereon by *Saunders* went to decay, and was disused in 1785, and was not rebuilt in the year 1787, within two years thereafter, and by the terms of the law and estate for years granted by the *proprietary*, then ceased, and the lease became null and void. This being the character of the condition of the lease broken, advantage of the breach may be taken without entry on common law principles, either by the original owner, or by the assignee of the reversion. *Vid. Duppa and Mayo*, 1 *Saund.* 287. The re-entry given by the act of 1704, to the owner, was a summary remedy designed for his benefit, and does not alter in this respect the principles of the common law, which restrains the assignment of an entry for a condition broken, where, after the forfeiture incurred, the estate may continue, but allows it, where the violation of the condition puts an end to the estate of the particular tenant. But there was an entry in this case by *James Norris, Jr.* in the year 1805, and agreeably to the language of the act of 1704, he might have supported an ejectment for the land, without further entry; and his grantee and those claiming under him, are surely in the same situation with himself, and may sue in ejectment, upon their right of entry. It is the case of

constant occurrence, where a grantor having a right of entry on land, conveys it to another, and therewith necessarily, the power to maintain an ejectment for it.

In the first part of the bill of exceptions, the defendant, the appellant, had prayed the direction of the Court to the jury, that if they believe all the matters given in evidence, that then the length of possession holden by the defendant and those under whom he claimed, doth in law bar the plaintiff's recovery of the land, included in the lease to *Saunders*; this direction the Court refused to give, and we think rightly. We cannot perceive any thing in the facts of the case, that looks like a possession, adverse to the title of the plaintiff, until the year 1805, when on the demand of *Norris, Jr.* the possession was refused to be delivered to him by the defendant. When the land was enclosed by *Saunders*, he was confessedly the tenant of *Norris*, the elder, and it is natural to suppose fenced it in, that he might have the greater enjoyment of it. That the enclosures were kept up by *Webster*, and his tenants, with the same views, we must presume, where no attempt is made to prove an altered, and adverse intention. If no rent was paid, and the tenancy not expressly admitted, there is nothing to shew that the possession was held in hostility to the rights of the landlord, and those claiming under him. In the absence of this proof nothing is to be presumed in favor of an adverse possession, and more particularly so, where it commenced rightfully, and with the consent of the owner. The mere holding over, after the term ended, is not evidence of an adverse possession, and the possessor will be regarded as the tenant at will of the landlord, unless he can shew that since the expiration of the lease, he has held forcibly, or has acquired a title, paramount to that under which the possession was originally taken. Something more than an intimation of hostility in such a case is necessary, and the possessor coming in under the assignee of the lease, as in this case, must be supposed to hold his title.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

EDELLEN'S EX'RS vs. DENT'S Adm'rs.—June, 1830.

A testator directed the whole of his real and personal estate, not specifically devised, to be sold on credit by his executors, and the proceeds applied to the payment of his debts and legacies. At the time of making his will, and at his death, he was indebted to E, one of his pecuniary legatees, to whom he devised a greater sum than he owed. In an action by E against the executors to recover the debt due to her from the testator, HELD that her legacy was not to be taken as a satisfaction of the debt due her.

The general rule of law that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable; but it is not an unbending rule, and not being much favored, is made to yield to slight circumstances.

An express devise for the payment of debts and legacies—the creation of a fund for the payment of debts, and a charge of the legacy on that fund—if the legacy be uncertain, and made to depend upon a contingency—if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, are each cases in which a legacy will not be considered as a satisfaction of the testator's debt.

APPEAL from *Prince George's* County Court.

This was an action of debt by the appellee, as administrator, *d. b. n.* of *Elizabeth Dent*, against the appellants, *Joseph Edelen* and *Nicholas Stonestreet*, as executors of *James Edelen*, on a single bill, signed by the appellant's testator, payable to the intestate of the appellee, for \$1409 86, on demand, and dated on the 20th June, 1812. The defendants pleaded payment, on which issue was taken. The following statement of facts was submitted for the decision of the court: "*James Edelen*, by his last will and testament, dated 29th August, 1813, which was duly proved and recorded in the office of Register of Wills of *Prince George's* county, and which is as follows, to wit: 'In the name of God, Amen; I, *James Edelen*, of *Prince George's* county, &c. *Item*, I will and direct that my executors hereinafter named, shall pay and satisfy all my just debts. *Item*, I will, and devise, that all my land and real estate, consisting of the plantation on which I live, the one on

which *Dixon* now lives, and the one occupied by *Joseph N. Stonestreet*, shall go to my executors, to them, and their heirs, for the following purposes, to wit: to be by them sold, as soon as they can be, and the money arising from the sale of said land, shall be distributed among my legatees hereinafter named; and I also will and direct, that all my personal estate, not hereinafter particularly devised, shall be also sold by my executors, and the whole proceeds divided among my legatees hereinafter named. The whole money arising from the sales of real and personal property, to be distributed in the proportions hereinafter designated. And I direct, that the real estate shall be sold upon a credit of six, twelve, and eighteen months, from the day of sale, and the personal property upon six months credit, the purchasers giving bond with approved security, for the payment of their respective purchases. *Item*, I will and devise to my brother *Joseph Edelen*, the sum of \$6,000 to him for his life, that is, he shall receive the interest of the said money, and at his death to be equally divided amongst his children. I also give to my brother *Joseph Edelen*, my two years old sorrel colt, out of *Floretta*. *Item*, I give to my sister, *Elizabeth Dent*, the sum of \$2,500, and I direct that she shall pay the interest of said \$500 annually, to her son *William Lewis Dent*, and at his death shall divide it amongst his children. *Item*, I give to *George W. Dent*, the sum of \$250. I also give to my sister *Elizabeth Dent*, negro girl called *Suck*. *Item*, I give to my sister *Margaret Stonestreet*, the sum of \$2,000: I also give to my sister *Margaret Stonestreet*, negro woman *Harriet*, and her children. *Item*, I give to my sister *Sarah Pye*, the sum of \$1500. *Item*, I give to my sister *Mary Stonestreet*, the sum of \$500. *Item*, I give to my sister *Mary Stonestreet*, negro woman called *Betty Day* and her children, and also *Bob*, his wife, and three youngest children. *Item*, I give to my brother *Samuel Edelen*, my negro boy called *Patrick*, and I release to him the money he owes me. *Item*, I give to my niece *Jane Diggs*, negro woman *Betty*, and her four

children. *Item*, I give to my niece *Mary N. Stonestreet*, negro girls *Mary* and *Kitty*, and negro boy *Daniel*. *Item*, I give to my nephew *Joseph N. Stonestreet*, the sum of \$500, and release and discharge him from his note, and then after various other specific, and pecuniary bequests, the testator constitutes the appellants his executors, and bequests to the intestate of the appellee, the further sum of \$250. The several pecuniary bequests to the intestate of the appellees contained in the foregoing will, amounted to the sum of \$2750, and at the time of his death it was admitted, that the appellant's testator owed to her, as evidenced by the single bill upon which this action is brought, the sum of \$1409 86, with interest from the 20th June, 1812. The will of the appellant's testator, was proved on the 8th of January, 1814—the money due by the single bill, was payable, before and at the time of the testator's death; and upon this statement the question is, whether, the debt due *Elizabeth Dent*, is satisfied by the legacy. It was agreed that the preceding statement should have the same effect as a special verdict, each party reserving the privilege of appealing. The county court gave judgment on the case stated for the plaintiff, and the defendants appealed to the court of appeals.

The case came on to be tried before **BUCHANAN**, Ch. J. **EARLE** and **ARCHER**, J. and was submitted on notes.

Stonestreet, for the appellants.

This was an action of debt on a single bill, dated in June, 1812, for the sum of \$1409. The defendants below pleaded that the debt was paid, by the gift of a pecuniary legacy of a much larger amount, by the will of *James Edelen*, dated August, 1813. It is contended on the part of the appellant, that the general rule of law is, that a pecuniary legacy of an equal or larger amount, will be considered a satisfaction of an existing debt—and it must be collected from the whole will, whether the testator intended it should be

a satisfaction of the debt or not. In this case it is contended that it manifestly appears that such was his intention. In the first place he devises that all his estate, real and personal, shall be sold by his executors, and the proceeds divided amongst his legatees after named, embracing necessarily the fund for the payment of debts. This is the only debt that he owed, and it is certain he designed it should be paid; and as he has directed the proceeds of sales of both real and personal estate, to be applied to the payment of legacies, therefore he intended that the legacy to *Elizabeth Dent* should include her debt. Again it appears from the will, that the testator had four sisters—and it may be presumed that they were equally the objects of his bounty; and in the bequests of pecuniary legacies to them, it will be seen, that he has given to his sister *Elizabeth Dent*, more than to the others; a sum, at least, equal to the debt due to her; thus shewing that he intended the legacy as a payment of the debt—the debt was only about a twelve month standing when he made his will. It is also a circumstance, entitled to no little weight, that it would seem, he had made some calculation about the amounts he had given, probably with what he owed, for at the very end of the will, being the last item, he gives to *Elizabeth Dent* an additional sum of \$250—her legacy previous to that, was larger than to either of the other sisters. I am aware that it will be objected in this case, that the payment of the legacy is postponed, as it is to be paid from the proceeds of sales of the real and personal estate; this is no objection in this State, because by the testamentary system, an executor is allowed twelve months to ascertain the amount of the debts of the deceased, and cannot be compelled to pay them before that time; it is certain if he pays previously, he does it at his peril, if there should not be assets to pay the debts. Again, if the sale of property is necessary for the payment of debts, (and in this case it is so) the uniform practice of the Orphans Court, which is sustained by the law, is to order sales of personal proper-

ty, for the payment of the deceased's debts, upon a credit of at least six months; and, in this case, the testator would appear to have conformed to that practice and law, by ordering his personal property to be sold on six months credit, and thus providing for the payment of that debt, the very means and within the very time that the legal tribunals of the country would have done in case he had omitted it. Therefore, his adopting the *very course* the law would have proceeded in, for the payment of the debts, is a ground from which to infer that he intended the legacy should pay the debt. For these reasons it is contended that the Court below erred in giving judgment for the plaintiff.

R. Johnson, for the appellee.

The only question in this case is, whether the debt from which the judgment below was given in favor of the appellee, was extinguished by the legacy to *Elizabeth Dent*, the appellee's intestate, bequeathed by the will of *James Edelen*, the testator of the appellants. The rule of law that a legacy to a creditor of an equal or greater amount than his debt, is to be taken as a satisfaction of the debt, is not denied. It has been too long established to be now shaken, but it is equally certain that it has never been a favorite with the Courts, and that the slightest circumstance has been seized upon to avoid its operation. 2 *Mad. Ch.* 42. *Richardson vs. Greese*, 3 *Atk.* 65. *Matthews vs. Matthews*, 2 *Vez. sen.* 636. In the case in 3 *Atk.* Lord *Hardwicke* holds this language: "length of time will not suffer it (the rule in question) to be shaken now, as it has become the fixed rule of property, and yet the maxim *debitur non præsumitur donare*, would not hold if it was to be reconsidered, for the Courts have always shewn some dissatisfaction at the rule, and endeavor, if there is any room to do it, to distinguish the cases out of it. They have said indeed they would not break the rule, but at the same time have said, they would not go one jot further, and have been fond of distinguishing cases since, if possible."

There are two circumstances in the will in the present case, either of which is sufficient to take the particular bequest out of the application of this rule. The first is, that the testator before giving the legacy, directs his executors to pay and satisfy all *his just debts*. The second is, that the debt in controversy, was an existing debt, actually due at the date of the will and at the testator's death, and the payment of the legacy is postponed, to at least six months from the latter period.

The will directs, that the real and personal estate of the testator, should be sold by the executors. The real, upon a credit of six, twelve and eighteen months, and the personal, upon a credit of six months, and that the legacies are to be paid out of the proceeds of the sale. *First*, That a direction for the payment of the debts avoids the rule, see 2 *Mad. Chan.* 42. *Chancey's case*, 1 *P. Wms.* 408. *Richardson vs. Greese*, 3 *Atk.* 65. *Hinchliffe vs. Hinchliffe*, 3 *Ves.* 529. The cases in *P. W.* and in *Atk.* will be found substantially the same as the one before the Court. *Second*, The postponement of the payment of the legacy. See *Nicholls vs. Judson*, 2 *Atk.* 300. *Clarke vs. Sewell*, 3 *Atk.* 96. *Peacock vs. Falkener*, 1 *Bro. C. C.* 296.

The counsel for the appellants endeavor to escape the effect of this circumstance upon the ground, that by our testamentary system, an executor is allowed a year to discover the amount of the debts, and is not bound to discharge any of them before the expiration of that period. Conceding that this difference between the situation of an executor here and in England, would in any case make any change in the law, (which however is by no means admitted,) what influence has it upon the case before the Court. The postponement here of the legacy, it is obvious may in part at least be six months beyond the end of the year, when the executors would be bound to pay the debts, because the whole fund out of which the legacy is to be paid, is not to come into their hands till eighteen months, not from the death of the testator, but from the time the

property directed to be sold, is disposed of. There can then be no reason why this second exception to the rule should not be held to embrace this case.

There is an additional circumstance in the will before the Court, tending to shew that the testator could not have designed to satisfy this debt by the legacy in question. It is this, that in his specific bequest to *Samuel Edelen*, and in his pecuniary legacy to *Joseph N. Stonestreet*, he expressly releases them from the debts they owed him. Shewing manifestly that he did not contemplate interfering with his debts in any way by any of his legacies, and that he intended them all as *bounties*.

BUCHANAN, Ch. J. delivered the opinion of the Court.

The question here is a very short one. *James Edelen* being indebted to his sister *Elizabeth Dent* on a single bill, which was due before, and at the time of his death, made his will after it had become due, in which he first directs that his executors shall pay and satisfy all his just debts. He then directs, that they shall sell the whole of his real estate, and all his personal estate not specifically bequeathed; the personal property on a credit of six months, and the real estate on a credit of six, twelve, and eighteen months, and that the whole of the proceeds shall be distributed among his legatees therein after named, in the proportions designated. To his sister *Elizabeth Dent* he bequeaths a sum of money exceeding in amount the debt due from him to her; and whether this pecuniary legacy shall be taken as a satisfaction of the debt, is the question submitted?

The general rule of law, that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable; but it is not an unbending rule, and not being much favored is made to yield to slight circumstances to be found in the will. Such as an express devise for the payment of debts and legacies, the creation of a fund for the payment of debts, and a charge of the legacies on that fund; or if the legacy be uncertain and made to

depend upon a contingency, 2. *Mad. Ch.* 42, 43, 44, 3 *Atk.* 65, or if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, 2. *Mad.* 44. 3 *Atk.* 96. 1 *Brown's Ch. Rep.* 295. In this case with the exception that the legacy is not made to depend upon a contingency, all those circumstances concur. The debt was subsisting and due before and at the time of the testator's death; there is an express devise for the payment of debts and legacies, the creation of a fund charged with the payment of debts and legacies, and the legacy to *Elizabeth Dent* is not made payable immediately on the death of the testator, but with the other legacies, is to be paid out of the proceeds of sales of the real and personal property, and might in part at least, not be paid until long after the executors by law were bound to pay the debts, the real property being directed to be sold, at a credit of six, twelve, and eighteen months, from the time of sale.

There is moreover another circumstance presented by this will, which is worthy of consideration. It is this, that there is a specific bequest, to one of the objects of the testator's bounty, and a pecuniary legacy to another, to whom he expressly releases the debts respectively due by them to him; which tends to shew the general intention of the testator, that the different legacies bestowed should be enjoyed as clear bounties by those to whom they were given, unaffected by any debts, owing to, or by him, or them. We therefore think, that the pecuniary legacy to *Elizabeth Dent*, is not to be taken, as in satisfaction of the debt which was due to her by the testator.

JUDGMENT AFFIRMED.

MUNDELL vs. HUGH and LLOYD PERRY.—June, 1830.

Where it does not appear, either from the plots themselves, or the surveyor's explanations, what was the object or design of certain lines upon plots returned under a warrant of resurvey, nor from the surveyor's certificate, that he had ever made such locations, it is not competent to shew, that the surveyor laid down such lines for a counterlocation of a tract of land described in the plots; for such lines are a mere nullity.

If testimony, out of the plots and explanations filed with them, could be received, to give name and character to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause.

The object and intention of introducing plots in the cause, is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used, to illustrate, and support, the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of the Courts, to reject evidence as to any object, unless it is located on the plots.

The proprietor of adjacent tract of land, conveyed the younger tracts by metes, and bounds; all the land contained within those metes and bounds, passes to the grantee, although part of the elder tract is embraced in them.

A deed of land executed in the year 1735, to be competent evidence, should appear to have been recorded, according to the provisions of the act of 1715.

In trespass for breaking the plaintiff's close, and cutting down his trees, if the plaintiff fail to prove the cutting his trees, he may still recover for the breach of his close.

Prior to the act of 1825, *ch.* 117, it was the duty of the Court to notice errors apparent on the face of the record, or any legal objections to evidence set out in the record, although they were not brought into the view of the Court below, nor formed any part of the bills of exceptions.

Where the declaration charged that the defendant, the close of the plaintiff's, called ———, situate, &c. broke and entered, and defence having been taken on warrant, and neither the warrant, nor any of the proceedings under it, gave any name to the close of the plaintiff, the Court refused to affirm a judgment rendered for the plaintiff, prior to the act of 1825, *ch.* 117, upon proceedings thus defective on their face.

APPEAL from *Prince George's County Court.*

Trespass quare clausum fregit, instituted by the appellees, against the appellant, *Thomas Mundell*, on the 9th of April, 1818. The declaration charged that the appel

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lant on the 1st of April, in the year 1817, and on divers days between that day, and the day of impetrating the writ in this case; the close of the said *Hugh* and *Lloyd*, called ———, situate in the county aforesaid, broke, and entered, &c. and cut down the timber and other trees, &c.” Pleas not guilty, and *liberum tenementum*. A warrant of resurvey was issued, without the name of the land to be surveyed, and plots were made, and returned.

1. At the trial the plaintiffs read in evidence the patent of a tract of land called “*Marsham’s Rest*,” containing 750 acres more or less, which was patented to one *Richard Marsham* on the 26th of May, 1664; and then offered proof that the plaintiffs were, at the time alleged in the declaration, or the time when the trespasses were alleged to have been committed, and for several years before, in possession of a part of said land called *Marsham’s Rest*, and proved the commission of several trespasses, by the tenants of the defendant, in the *locus in quo*, designated on the plots in the cause by a line drawn from black D, to red D, to I, and to black D.

The defendant then for the purpose of showing that the plaintiffs location of *Marsham’s Rest*, was not the true location thereof, but that if the said land was truly located, the acts alleged as trespasses proved, would not be found to have been committed within the lines of the said tract of land, but within the lines of a tract called *Quicksale*, which belonged formerly to the defendant, and offered to shew a location on the said plots, beginning at red A, the beginning of a tract of land called *Taylorton*, as so located on said plots, running with yellow shaded lines, around the plaintiffs said location of *Marsham’s Rest*, by red D to said red A, as a counterlocation of *Marsham’s Rest*, and to produce evidence of the correctness of that location, which was objected to by the plaintiffs on the ground, that it did not appear on the plots, by whom that location had been made, or what land it was, that was thus located, and because there was not on the said plots any explanations of

the said alleged counterlocation. Whereupon the defendant produced another plot, formerly made in the cause, and proved by the clerk, that the plots filed in the cause had been delivered by him under the leave of the Court, to add and amend, to the sheriff of the county, for the purpose of making the amendment; and further proved by the surveyor, that he had received that plot from the sheriff, for the purpose of making the amendment, and that, instead of making the amendment, on that plot, he having been directed by the Court, to combine that plot and explanations with another, that had been made out for the plaintiffs, copied, as he supposed, every thing from that plot so made out for the defendant, and the other plot so made out for the plaintiffs, upon another paper, which is the amended plot in this cause, marked B, and intended to have put into the explanations on the new plot, an explanation of the said location, claimed as the defendant's said counterlocation, of the said *Marsham's Rest*, as a location made by the defendant, and supposed he had done so, and that he had returned the said plot, on the first day of this term, and retained in his hands the other former plots, and now at the trial produced them in Court. Whereupon the defendant contended that he had a right to use the said counterlocation of *Marsham's Rest*, as the same is located, and explained in the said defendant's former plot, in the trial before the jury. But the Court was of opinion, and so instructed the jury, that it was not competent for the defendant to use the said alleged counterlocation of *Marsham's Rest*, and that the plaintiff's location thereof, was to be taken as uncontradicted by the defendant, in said cause, and as the true original location of said land. The defendant excepted.

2. The defendant thus, to prove title to the land located on the plots, as a part of *Quicksale*, located as his freehold, read in evidence a patent for the tract of land called *Quicksale*, containing 400 acres, to *Francis Street*, dated 22d October, 1666, and the deed of *Thomas Gantt*, (under

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whom the plaintiffs claim,) dated August 5th, 1735, to *Patrick Sim*, under whom the defendant claimed, for a part of the tract called *Quicksale*, containing 90½ acres more or less, which said deed did not appear to have been recorded, and offered to prove that the said *Thomas Gantt*, was at the time of the date of said deed, the owner and holder of the tract, called *Marsham's Rest*; but the Court were of opinion that the deed of the said *Thomas Gantt*, purporting to convey *Quicksale* by name, could not, under such circumstances, convey title to any land that lay within the lines of *Marsham's Rest*, the elder survey, even though said *Gantt* was at the time owner, and holder of both of the said tracts. The defendant excepted.

3. The Court then, upon the prayer of the plaintiffs, instructed the jury, that the plaintiffs in the event of their failing to prove the trespass by cutting trees, are entitled to recover for the breach of their close, if such fact is proved to the jury. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was submitted on notes, to BUCHANAN, Ch. J., EARLE, MARTIN, ARCHER, and DORSEY, J.

Taney, (Attorney General) and *Mundell* for the appellant.

There are three points presented in this case. The first arising on the *first* bill of exceptions, to wit: whether or not the defendant was entitled to the benefit of his counterlocation of *Marsham's Rest*. It appears from the statement of the evidence that the plaintiffs location of *Marsham's Rest* had been counterlocated by the defendant, and the plot of the same regularly returned to the court, signed by the sheriff and surveyor. The defendant, therefore, having done all that was required of him, in order to put the plaintiffs to the proof of the truth of their location, ought not to have been deprived of the benefit of his counterlocation, merely because the surveyor had, under a leave of the court,

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to add and amend, taken out the plots to copy them all on one piece of paper; the plot having been regularly made out and returned to the court by the surveyor, could not be withdrawn from the cause, unless on the application of the defendant, (which it appears never was done) but still continued as a part of the pleadings in the cause. The transcribing all the plots, and explanations on one piece of paper, which was the object in giving them to the sheriff again, was for the purpose alone, of enabling the jury to understand them better, and was by no means necessary; and any mistake in the surveyor in copying them, must, of necessity, be rectified by reference to the original plots, which were the pleadings filed in the cause. In actions of trespass, the plots returned are always considered as a part of the pleadings. In this case the plaintiffs located their tract of land called *Marsham's Rest*, and the plot of the same was returned by the surveyor to the court. The defendant then counterlocated the said tract, and located his tract called *Quicksale*, shewing that the alleged trespass was committed within the lines of the latter tract. The plot of this counterlocation and location, was likewise returned by the surveyor to the court; both plots were filed, and both parties must have known the situation in which the pleadings stood. The surveys were ended, and the only object in transcribing the plots, was for the convenience of the jury; and the plots, the original pleadings, were for this purpose, put into the hands of the surveyor, an officer of the court, to transcribe. And can it be contended, that a mistake in transcribing them, by the officer of the court, could prove prejudicial to either of the parties; when the originals were in court, by which the error could be rectified, or that the mere making out this plot for the jury could prevent the original plots from being given in evidence to them. The surveyor, in making out this copy for the jury, however, merely omitted the explanations of the plaintiffs counterlocation of *Marsham's Rest*, every thing else being correctly copied. But there was in court at the

same time the defendant's original plot, containing the explanation, omitted in the new plot. It is therefore contended that there is manifest error in the opinion expressed by the court on this point.

The point arising on the *second* bill of exceptions is this: Whether a man, owning two tracts of land contiguous, and making a conveyance of one by name, and by the metes and bounds therein described, he not only conveys all the tract, named in the conveyance, but a part of the other? In this case *Thomas Gantt*, under whom the plaintiffs as well as the defendant held, owned both, *Marsham's Rest* and *Quicksale*; and being so seized, executed the deed under which the defendant holds. He describes the land by metes and bounds. The defendant had located said deed as the part of the tract called *Quicksale*, for which he took defence; which location was not counterlocated by the plaintiffs, and the court having decided as in the first bill of exceptions, that the defendant could not use his counterlocation of *Marsham's Rest*, and that the plaintiff's location of the same stood undisputed. The parties therefore stood in court entirely on title; the plaintiffs on their title to the tract called *Marsham's Rest*, and the defendant on his to *Quicksale*. The defendant then offered in evidence the said deed from *Thomas Gantt*, the owner of both tracts, to shew that the land on which the trespass had been committed, and which the plaintiff had located as part of *Marsham's Rest*, was included within the metes and bounds, described by the said deed from *Thomas Gantt*, located on the plots. But the court were of opinion that the said deed purporting to convey *Quicksale* by name, could not convey title to any land that lay within the lines of *Marsham's Rest*. In which opinion of the court we contend there is error. It is a principle of law, that every deed or grant, shall be taken most strongly against the grantor, and most in favor of the grantee. It was certainly the intention of the parties to the deed, that the whole land included in the metes and bounds

therein described, should pass. *Thomas Gantt* was the owner, and in possession of *Marsham's Rest*—the grantee in the deed paid a valuable consideration for it, and it must be supposed that *Gantt* shewed the land to the grantee before the deed was made, and of course pointed out the bounds; and it cannot be supposed that *Gantt* intended to convey less than was contained within the bounds, because it would have been contrary to good faith and honesty, and it cannot be presumed he intended a deception. *Gantt*, in his deed, warrants and defends the land against all persons. This circumstance seems conclusive to shew it was the intention of *Gantt* to convey all the land included within the metes and bounds. In favor of a purchaser, all the land included within the metes and bounds will be presumed to have acquired the name of *Quicksale*, by reputation. Suppose *Marsham's Rest* had included the whole of *Quicksale*, would the deed of *Gantt*, for valuable consideration, have been inoperative? It will not be contended. It would have conveyed the whole, notwithstanding on the principle that the intention is to prevail, and the deed shall be taken most beneficially for the grantee—the reason is the same when only a part is taken away. That part of *Marsham's Rest*, not included within the bounds described by the deed, had acquired the name of *Quicksale* by reputation. In support of these principles we refer the court to *Hawkins vs. Hanson, Harr. and M'Hen.* 523, and the cases there cited; and to the case of *Benson vs. Musseter, 7 Harr. and Johns.* 208.

Stonestreet for the appellees.

The appellees contend that the court did not err in refusing to permit the appellant, the defendant below, to question the correctness of the plaintiff's location of the tract of land called *Marsham's Rest*. It appears from the record and plots as referred to by the appellant in his statement, that the surveyor had fallen into the obvious error of placing the locations made by the plaintiffs, on one piece of paper, and those for the defendant on a separate paper, at a term of

the court long before the trial;—the court, at the request of the counsel on each side, ordered the surveyor to place the whole locations of each on the same paper; and make such amendments as either might require, and the cause was continued. At September term, 1823, the one plot was filed in court, containing all the locations; at least, neither party asked further leave to add or amend. A jury was empannelled, and the trial was proceeded in. It will be observed the two former plots, which separated the locations, were neither of them then in court; nor was that complained of by either side. If the explanation and location by the defendant of *Marsham's Rest* was necessary for his defence, why did he go to trial without it; he saw it was not in court, and he should have asked leave to amend, if he deemed it necessary to his defence; or he could have obtained leave to amend, when he discovered the necessity for it at the trial; but he would not, and preferred his exception. It will be observed by the court, that it never was designed, that both plots should be used at the trial; the one plot embracing the locations of both sides was intended as a substitute for the two previous plots. Is it not certain, that a location and counter-location, could not be compared so as to ascertain which was the correct location when they were on separate papers? and if so, then it was the neglect or laches of the defendant to go to trial, in that state of things, and if he suffers, it is from his own neglect. *Leges vigilantibus non dormientibus subvenit*—and even if the appellant could invoke the aid of the plot referred to, it is contended that he has not there made such an explanation and location of the tract of land called *Marsham's Rest*, as would have entitled him to use it at the trial; and I would ask how he could shew, that if it was a different location of the land from that made by the plaintiff, unless they were put together on the same paper; that the locations could not be used in court so as to answer the ends for which they were intended, unless they were all placed together on the same paper, was ruled by the court, and admitted by the counsel on both sides; then, necessari-

ly, before the defendant below could avail himself of his locations on the plot, containing the explanation, he must have had leave to amend, to place that location and explanation correctly before the court; but the defendant declined to avail himself of that means to get the benefit of the counterlocation, and elected to take his exception. If the mistake was in the surveyor, and it operated against the defendant below, the Court would certainly have admitted an amendment, in the least inconvenient manner to him; and that he should have taken that course, there remains no doubt. It is denied that the locations returned on separate papers, were ordered to be transcribed, merely for the convenience of the jury; it was *indispensably necessary* to enable the Court and jury correctly to understand them, and thereby to test their relative correctness; and although the plots in the case are considered the pleadings; in this case, the separation of the plaintiffs and defendant's locations and putting them on different papers, was adjudged by the Court and admitted on all hands, to be a gross error; and that in that state, they would not answer the objects for which they were intended. They were therefore condemned—and I would assimilate them in that state to a plea that had been adjudged bad on demurrer, and leave had been granted to amend; in that case the plea thus condemned, although it remains in the case, cannot be considered at the subsequent trial of the case. The plot referred to was not amongst the papers in Court, when the case was taken up for trial; and I suppose that was known to the defendant; the surveyor produced it when called on at the trial, and if any material allegation was omitted in the substituted plots, it was his duty to have known it, and to have had it corrected before the jury was sworn; after, it was too late, except by withdrawing a juror.

Upon the second bill of exceptions it is contended, that the Court did not err in refusing to give the effect and operation asked for, to the deed from *Thomas Gantt* to *Patrick Sim*, offered in evidence in the Court below, by

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the defendant, for the following reasons : first, the said deed has not been recorded amongst the land records of *Prince George's* county, or in any other place, as required by law, to give effect to it. In the second place, the said deed has not been located on the plots, as part of *Quicksale* ; nor is there any location of the whole tract of land called *Quicksale* ; certain lines are marked out on the plot shaded green, but the surveyor gives no explanation by which we are informed what location it is ; and it is the only evidence, that can show to the Court and jury legally, what land the lines are intended to embrace. If the Court should determine, that with the explanation filed in the Court, the locations of the defendant can be considered as a part of the pleadings in the case at the trial, then the tract of land called *Quicksale*, has been located, but not otherwise, and on that there is no location of the deed from *Thomas Gantt* of part of *Quicksale* ; it is also stated in the second bill of exceptions that the said deed of *Thomas Gantt*, is offered to prove that said *Gantt* had a title to part of the tract of land called *Quicksale* and part of *Marsham's Rest* ; I suppose, because by the lines and courses of said deed, part of each of said tracts is claimed to be embraced within it ; it is contended that no such proof would be made by said deed, even if it had been regularly *acknowledged* and *recorded* ; (neither of which requisites has the said deed ; and the want of either, would, it is contended, render it a nullity.) It is also contended as it purports to convey only a part of *Quicksale* ; and as the evidence, relied on, to shew that *Thomas Gantt* was entitled to a part of *Marsham's Rest*, at the date of said deed, is insufficient ; that it cannot be used to shew a title in the defendant below, in any part of *Marsham's Rest*—that being an elder tract than *Quicksale*. The point reserved in the third bill of exceptions, I presume is abandoned by the appellant, as he makes no argument against its correctness ; nor is it believed he could, with any probable success, as the plaintiff below has not only charged the breach of his close in the declaration, but

has marked on the plot the trespass, by taking away his fence-logs, and proved it to the jury—for this evidence, I refer the Court to the last explanation and location made by the plaintiff below.

MARTIN, J. delivered the opinion of the Court.

An action of trespass for breaking, and entering the close of the plaintiffs, and cutting down their trees, produced the appeal, that now becomes a subject of examination in this Court. A warrant of resurvey was issued to the surveyor to locate such lands, as the parties deemed necessary, to explain their respective titles. Locations were made for both the plaintiffs and the defendant. But instead of placing their locations on one paper to give a distinct view of the whole, the surveyor returned one plot with the locations made for the plaintiffs, and a separate plot containing those made for the defendant. Under leave to add, and amend, he was directed by the Court, to place the locations he had made for the defendant, on the plot returned for the plaintiffs. Under the impression that these directions had been complied with, the plot letter B, was filed in the cause, and the plot originally returned for the defendant, was retained by the surveyor. The plaintiffs having located a tract of land called *Marsham's Rest*, and the alleged trespasses to be within the lines of that land, as thus located, the defendant offered to shew a counter location, of that tract as made by him, on the amended plot, beginning at red A, running to near red D, and round to the beginning at red A, and to produce evidence of the correctness of that location, which was objected to by the plaintiffs. On reference to the amended plot we find four lines are drawn with yellow shading, beginning at red A, running to red D, and round to the beginning at red A. But whether these lines are to represent the location of any land, and if any what land, by whom it was made, or for what purpose it was done, does not appear either by the location itself or any explanation on the face of the plot, or filed with the plot ;

nor does the certificate of the surveyor state he ever made such a location. The defendant then attempted to aid the defect by giving in evidence to the jury the plot originally laid out for him, on which *Marsham's Rest* was located, and which had been retained by the surveyor, and by the parol testimony of the Clerk of the Court, and the surveyor, who stated in substance that the plots originally filed in the cause had been delivered to the surveyor, for the purpose of putting the locations made by the defendant, on the plot returned for the plaintiffs; that the surveyor under the impression that he had done so, returned the plot B, as the amended plot, which was filed in the cause, and the plot originally made out for the defendant was retained by him, which plot he produced in Court. This testimony was rejected by the Court, and presents the question arising upon the first bill of exceptions.

On the plot marked B, we find a parallelogram included within four lines shaded with yellow, but as before stated no name is given to the land, intended to be represented by that figure. It is not stated by whose direction it was made, nor for what purpose it was placed there, nor does the surveyor, in his certificate, say it was made by him. It is therefore a mere nullity. An imaginary location from which neither plaintiffs nor defendant could derive any information or advantage. Could the defendant clothe this nondescript with name, character, and legal effect, by the production of the other plot, and the parol evidence offered by him?

If testimony out of the plot and explanations filed with them, could be received, to give name, and character, to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause. If you can resort to such evidence to explain one tract, you may resort to it, to explain all. It would then only be necessary to place certain lines upon a piece of paper without name, without explanation, and without stating the purpose for which they were made, and file it

with the Clerk. What advantage would such an unmeaning paper be, to the parties? It would not enable them to ascertain the grounds upon which his opponent relied, nor to make counterlocations of the lands, if such counterlocations were deemed proper. The object and intention of introducing plots in the cause, is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used to illustrate, and support the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of Courts, to reject evidence as to any object, unless it is located on the plots. If a tract of land has been located by one party, and not counterlocated by the other, the location is admitted to be correct. 3 *Harr. and Johns*. 13. But how is it possible, for a party to know whether a counterlocation is called for, until he is apprised that a location of the land is made? In the cause now before the Court, the plaintiffs located the tract of land called *Marsham's Rest*, and upon an examination of the plot and explanations, seeing no counterlocation of that land, they had a right to conclude the location was admitted. Had the counterlocations been apparent by a proper explanation filed with the plot, they might have made further locations of that land to shew its true position and extent. But it is said this case stands upon different grounds. That the plot originally filed for the defendant, was still filed in the cause, and the plaintiffs might have resorted to it when they pleased. But what advantage or information could they derive from it? The locations on the two plots are entirely different, and no man, unless he possessed the spirit of divination, could know by an examination of these two plots, that the figure within the yellow shading, and *red* letters on the amended plot, was intended to represent *Marsham's Rest*, as located on the plot returned for the defendant. We therefore concur with the Court below in the opinion expressed in the first bill of exceptions.

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In the progress of the trial of this cause, the defendant offered in evidence to the jury, a deed from *Thomas Gantt* to *Patrick Sim*, (under whom he claimed title,) for part of a tract of land called *Quicksale*, and to prove that the said *Gantt* was at the time of the date of the deed, the owner, and holder of the tract called *Marsham's Rest*. The deed states that the part of *Quicksale*, sold by the grantor, was contained within certain metes and bounds, particularly specified in the deed. Upon a location of these lands it appeared a part of the land contained within the metes and bounds, mentioned in the deed for *Quicksale*, was included within the lines of the elder tract, called *Marsham's Rest*. The Court were of opinion, (as appears by the second bill of exceptions) that the deed purporting to convey part of *Quicksale* by name, could convey no land but *Quicksale*. In this opinion we think they were decidedly wrong. *Gantt*, being the proprietor of both *Marsham's Rest* and *Quicksale*, if he conveyed the younger tract by metes and bounds, all the lands contained within those metes and bounds, would pass to the grantee, although part of the elder tract was embraced within them. Many decisions of this Court might be produced, to sustain this doctrine, and whether it depends upon the principle of carrying the intention of the parties into effect, or that a deed shall be taken most favorably for the grantee, the law is now too well established to be questioned. *Hawkins vs. Hanson*, 1 *Harr. and M'Hen.* 523. *Hall vs. Gittings*, 2 *Harr. and Johns.* 119.

It may not be improper however to remark that this deed, as it appears in the record, was not legal evidence to be given to the jury. It was executed on the 5th of August, 1735, and does not appear to have been recorded, according to the provisions of the act of 1715. Whether the defendant might not have produced testimony to give it legal effect, had he not been stopped by the Court, is not necessary for us to decide.

The *third* exception appears to be abandoned by the appellant, but if relied on cannot avail him. We concur with the Court in this exception.

The appeal in this case was entered in the year 1823, and therefore is not affected by the act of 1825, *ch.* 117, and it is the duty of the Court to notice errors, apparent on the face of the record, or any legal objections to evidence set out in the record, although they were not brought into view in the Court below, nor formed any part of the bills of exceptions. *Speake vs. Sheppard*, 6 *Harr. and Johns.* 86. The declaration in this cause does not state the name of the land on which the trespasses are alleged to have been committed. That still remains in ———. The warrant of resurvey is open to the same objection. The surveyor is directed to lay down all that plantable land, called ———, and when we examine this *supposed* amended plot, we think we hazard nothing in saying, a more defective one never was presented in a Court of justice. Having placed the locations of several tracts of land upon the plot, an explanation is made to some of them, and to others no possible clue is given, by which you can ascertain either the name of the land located, the party by whom, nor the object for which it was located. Some of the locations appear to be merely imaginary lines, drawn without any authority, and without any meaning. Nor is it in a better situation when we look at the certificate of the person who returned this *amended* plot. It professes to have been made by virtue of a warrant of resurvey to lay down all that plantable land called ———, without naming it. Nor can this blank be supplied, by either the warrant of survey, or the declaration filed in the cause. The same ——— is to be found in all. The certificate to the plaintiff's location then states, "I hereby certify, as surveyor of the county aforesaid, that I have in the presence of the sheriff of said county, carefully resurveyed, and laid down the tracts of parcels of land above explained, &c." To this certificate two seals are annexed, but neither

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the name of the sheriff nor surveyor appears to the certificate. The certificate to the locations, made by the directions of the defendant, is still more defective. That does not state by whom the survey was made, or that it was made in the presence of the sheriff. It is subject to the same objections as to *blanks* with the certificate to the locations made for the plaintiffs. It is not signed by either the sheriff or the surveyor. This Court cannot affirm a judgment so fatally defective on the face of the proceedings.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

PENNINGTON, Adm'r of PATTERSON, vs. GITTINGS, Ex'r.
June, 1830.

The answer of an Executor or Administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one, with pregnant circumstances.

When an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge.

The gift by a father to his child of a certificate, that the father is entitled to a certain number of Shares in the Capital Stock in a Bank "transferable at the said Bank only, personally, or by Attorney," signed by the Cashier of the Bank, and endorsed in blank by the father will not sustain a bill in equity by the donee against the executor of the donor, praying for a transfer of the stock mentioned in the certificate.

Neither a *donatio inter vivos*, nor a *donatio mortis causa*, can be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift.

The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by

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the donor, with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiae*, (which must be the case, where he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation.

A gift which is not good and valid at law, cannot be made good in equity.

The consideration of natural love and affection is sufficient in a deed, but a mere executory contract, cannot be supported on the consideration of blood, or natural love and affection. There must be something more, a valuable consideration, or it is not good, and cannot be enforced at law, but may be broken at the will of the party.

APPEAL from *Chancery*.

The bill in this case was filed on the 18th of April, 1823, in *Baltimore County Court*, by *Ann Patterson*, the appellant's intestate, against the appellee, *James C. Gittings*, as executor of *James Gittings*. Afterwards the proceedings were, at the instance of the complainant, transmitted to the Court of Chancery on the 5th day of October, 1825. The bill stated that *James Gittings*, the father of complainant, late of *Baltimore county*, duly made his last will and testament, with a codicil thereto annexed, bearing date, the former on the 16th of September, 1818, the latter on the 6th day of November, 1820, and thereby amongst other things gave and bequeathed unto the complainant certain bank stock, and ground rents, and after giving some other legacies, the testator appointed *Richard Gittings*, *Archibald Gittings*, and *James C. Gittings*, his executors, and declared the said *James C. Gittings* his residuary legatee. That the said testator died on the 15th of February, 1823, without revoking said will, save by his codicil, and without revoking said codicil; whereupon the said *Richard* and *Archibald Gittings*, renounced the executorship, and the said *James C. Gittings*, the remaining executor, and residuary legatee, duly proved the said will, and undertook the execution thereof, as appears by exhibit A, filed as a part of the bill. That said executor took possession of the personal effects of the testator, to an amount more than sufficient to pay his debts, funeral expenses, and legacies. That said testator, about two years before his death, gave to

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complainant the ground rent, arising from property in the city of *Baltimore*, worth, at the time of the donation, \$260 per annum. That in consequence of the depreciation in said property during the life of the testator, the complainant advised with a certain *Edward Palmer*, as to the course necessary to be pursued by her to repair the loss occasioned by such depreciation, and that *Palmer*, in conversation with said testator a short time before his death, was told by him that he was sorry the complainant had lost her said ground rents, and that something should be done for her. That soon after the aforesaid conversation, the complainant visited the testator at his residence, and that, on that occasion the testator gave, and handed to her, certificate No. 446, *Commercial and Farmers' Bank of Baltimore*, entitling the holder thereof to 75 shares of the capital stock of the said bank, as will appear by exhibit B. That said testator, at that time, and in her presence, endorsed his name on said certificate, informing her that he gave her the same, to supply the loss of the ground rent. That since the death of the testator, complainant has requested his said executor to transfer the said stock to her, which he refuses to do. *Prayer*, that he may be compelled to transfer the *same*, and for further relief.

EXHIBIT A, is a certificate of the Register of Wills of *Baltimore* county, of the granting of letters testamentary to the defendant.

EXHIBIT B, is as follows: "Commercial and Farmers' Bank of Baltimore, No. 446. February 9th, 1819—This is to certify, that *James Gittings, Sen.* is entitled to seventy-five shares in the capital stock of the Commercial and Farmers' Bank of Baltimore, on each of which thirty dollars have been paid, transferable at the said Bank *only, personally, or by attorney.* Geo. T. Dunbar, Cashier."

75 shares.

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The answer of *James C. Gittings* states, the testator, *James Gittings*, the father of complainant, did, about the time mentioned in the bill, duly make his testament and last will, whereby he did devise and bequeath certain property to the complainant; and after making various other devises and bequests in favor of his other children, and grandchildren, he declared this defendant his residuary legatee, and constituted him, together with *Richard Gittings* and *Archibald Gittings*, joint executors thereof. The answer admits the death of the testator about the time specified, the renunciation of the other persons named as executors, and that he the defendant undertook himself the exclusive execution of said will, which he proved; and that he took possession of the personal estate of the testator, which he admits was more than sufficient to pay his just debts and legacies; the answer further admits the donation of the ground rent as charged, and a depreciation in the annual value thereof; it alleges that *Palmer* called on the testator, and in the presence of respondent mentioned the depreciation of the ground rent; that it then yielded nothing, and proposed to testator to take the ground rent back, and to give the complainant stock in lieu of it, which she would prefer; to this the testator replied, that it was too late, he had made his will, and could not alter it; the answer denies that the testator gave or intended to give to complainant the certificate for seventy-five shares of stock in the *Commercial and Farmers' Bank*, as alleged, and puts the complainant on the proof of the allegation; it denies also the delivery as stated; expresses a doubt of the genuineness, of the endorsement of the name of *James Gittings* thereon, and supposes that the same was made a considerable time before his death. The defendant acknowledges that he refused to transfer the stock, from a conviction that complainant had neither a legal nor equitable title thereto.

A commission issued, under which proof was taken and filed, but the same does not appear to be material.

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BLAND, Chancellor, (11th June, 1827.) This case standing ready for hearing, and the solicitor of the plaintiff having been heard, and no counsel appearing for the defendant, the proceedings were read, and considered.

The answer is fully responsive to the bill. The defendant has positively denied every allegation, upon which the plaintiff has rested her equitable pretensions, and the proofs and circumstances are too feeble to sustain the plaintiff's case, in opposition to an answer so clear, and strong: Whereupon, it is decreed that the bill be dismissed with costs.

From which decree the complainant appealed to this Court.

The case was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and STEPHEN, J.

Winchester and *Mayer*, for the appellant, contended,

1. That the answer is not fully responsive to the bill, and does not deny the allegations of it, so positively and directly, as to require the evidence of two witnesses, or one and circumstances to overthrow it. 2. That the rule in reference to answers should not be applied to this; if the representative capacity of the appellee, and the circumstances of the case be considered. 3. That the fact of *Mrs. Patterson's* possession of the certificate endorsed by the testator, proved the delivery of it; and that the certificate so endorsed, amounts to an equitable transfer of the stock, and considered with the evidence in the cause, entitled the complainant to a decree in her favor, even admitting the answer to be fully responsive, and to deny the equity of the complainant.

On the 3d. point they referred to *Reed vs. Ingraham*, 3 Dallas, 505. 1 Cranch, 438, 439. *Roberts vs. Gibson*, 6 Harr. and Johns. 128. 1 Campb. 442. *Russell vs. Langstaff*, Douglass, 514. *Violett vs. Patton*, 5 Cranch. 142. 2 Stark. 308. 3 Stark. 1642. 3 Campb. 239. *Peacock*

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vs. Rhodes, 2 *Douglass*, 633. *Wilkinson vs. Nicklin*, 2 *Dallas*, 396. *Dugan vs. United States*, 3 *Wheat*. 172. *Chitty on Bills*, 173, 174.

On the 1st. and 2d. *points* they referred to *Ringgold vs. Ringgold*, 1 *Harr. and Gill*, 82. *Newell vs. Huntington*, 1 *Johns. Ch. Rep.* 107. *Kane vs. Bloodgood*, 7 *Johns. Ch. Rep.* 110. 9 *Cranch*. 153, 160.

They insisted that the gift of the stock would be good, as a *donatio mortis causa*. *Ward vs. Turner*, 2 *Ves. Sr.* 432, 442. 3 *Atk.* 215. *Hill vs. Chapman*, 2 *Brown Ch. Rep.* 613. *Blount vs. Burrow*, 4 *Ib.* 72. *Pember vs. Mathers*, 1 *Ib.* 52.

Taney, (Att'y Gen'l.) and *U. S. Heath*, for the appellee.

The answer is responsive to the bill, and denies the gift of the stock, as well as the certificate, and it concludes its denial by calling on the complainant to prove her allegations. There is no proof that the endorsement on the certificate was made at the time of the alleged delivery, and unless that was the case, the endorsement can have no legal effect. If a bill had been filed against the testator to compel a transfer of the stock, a decree for that purpose could not have been obtained; how then can one be had against his executor? But suppose the allegation in the bill is proved, that is, suppose the *certificate* was actually endorsed, and delivered for the purpose of a donation, can the complainant recover? A contract between testator and complainant is not pretended, no consideration is charged or proved, and if there is any contract therefore, it is a contract to give, which is *nudum pactum* and void. To constitute a good gift of a chattel, there must be an actual delivery of the *thing* given, in pursuance of the gift. 2 *Black. Com.* 441. *Smith vs. Smith*, 2 *Strange*, 955. *Noble vs. Smith*, 2 *Johns. Rep.* 52. The *stock*, the subject of the supposed gift in this case, is a chattel; and a delivery of the certificate is not a delivery of the stock, which is a fund in bank, of which the certificate is not

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even a muniment of title. By a delivery of the certificate, dominion over the stock is not transferred; the party notwithstanding is entitled to the dividends, and may cause a transfer to be made on the books of the bank; he cannot therefore be said to part with the property. 8 *Petersdorf*, 464. A delivery of South Sea annuities, by way of donation, does not divest the donor of his title to the stock. *Ward vs. Turner*, 2 *Ves. Sr.* 431. *Mary and Jane Tate vs. Hilbert*, 2 *Ves. Jr.* 111. *Bryson vs. Brownrigg*, 9 *Ves. Jr.* 1. *Powell on Mort.* 1028, *Coventry's Edition* (note.) *Noble vs. Smith*, 2 *Johns. Rep.* 52. *Fink vs. Cox*, 18 *Ib.* 145. Considering the certificate as a negotiable instrument, and admitting that the endorsement of the testator's name gave the appellant the right to write what she pleased over it, still this right is limited to the life of the testator. 2 *Ves. Jr.* 121; his death would be a revocation of the power. There is no distinction, in regard to the necessity of delivery between gifts *inter vivos*, and *mortis causa*. In both cases the gift is not good, unless the thing given be itself actually delivered. 3 *Cov. Powell*, 1027, note (E.) *Ward vs. Turner*, 2 *Ves. Sr.* 431. Gifts which are invalid at law are equally so in equity. 3 *Cov. Pow.* 1029. 2 *Ves. Jr.* 128. But the very fact of their filing a bill in Chancery, shows the impression to have been that the gift was not good at law. This however is not a good gift either at law or in equity. The thing here alleged to be given is not tangible, and cannot be corporeally delivered. It cannot be transferred by gift therefore, unless by some act which gives to the donee complete dominion over it. Stock being the subject of the gift, there should have been a formal transfer. *Cov. Powell*, 1027, note (1) 1028. The stock in this case was certainly not transferred; to effect that, is the object of the bill. The delivery of a note does not transfer the property, 2 *Ves. Sr.* 443, 444. *Chitty on Bills*, 3, note (B,) and although the endorsement of it may, certainly the endorsement of a certificate of stock, cannot have

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that effect, since the paper itself shows it to be transferable in a different way.

BUCHANAN, Ch. J., delivered the opinion of the Court.

The bill was filed to compel the defendant, the executor of *James Gittings*, to transfer to the original complainant, *Ann Patterson*, daughter of the testator, seventy-five shares of stock, of the *Commercial and Farmers' Bank of Baltimore*; a certificate of which, it alleges, was given and delivered to her by the testator, who, it is stated, endorsed his name on the back of the certificate in her presence, and at the same time informed her that he gave her the stock.

The answer admits the name of the testator, endorsed upon the certificate to be in his hand writing, but denies that he gave or intended to give the certificate of stock to *Ann Patterson*, as alleged, and puts the complainant on proof of the allegation; and denies also the delivery of the certificate as stated. It may not perhaps be amiss here to remark, that the answer of an executor or administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, *that an answer asserting a fact responsive to the bill, can only be disproved or outweighed by the testimony of two witnesses, or one with pregnant circumstances*. A plaintiff, by calling on the defendant to answer the allegations in his bill upon oath, makes the answer evidence; and as one witness would only be equivalent to the answer, and the plaintiff to prevail must have preponderating proof, it is necessary that he should have another witness, or circumstances in addition to the testimony of one, in order to turn the scale. But looking to an answer as testimony only, it must be treated as any other testimony, and the weight of it must, from the very nature of evidence, in some degree depend on the fact it asserts. Therefore when an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but

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amount to an assertion of his impressions; and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. And upon the obvious principle, that when a witness asserts a fact, of which further developments in the course of his examination prove him to be in a situation to prevent his having a full knowledge of the subject, his testimony is not entitled to the weight of that of a man swearing to facts, which may be fully within his knowledge. The answer in this case, is of that description; and is not, we think, such as to require the testimony of two witnesses, or one with circumstances to outweigh it. But as it does not admit the allegations in the bill, it puts the complainant on proof, and leaves him to sustain them as he can, unembarrassed by any supposed responsive features, of the answer. Under the view however, that we had taken of the case, it is not necessary to examine whether the allegations in the bill have been sufficiently established or not, by the proof in the cause. For supposing them to be fully proved, it does not appear to us that the object of the bill can be gratified. The alleged gift seems to have been intended as a *donatio inter vivos*; but whether a *donatio inter vivos*, or *donatio mortis causa*, makes no difference. Such a gift cannot be by mere parol. The rule of law in either case is, that a *delivery* of the *thing* intended to be given, is essential to the perfection of the gift. This is admitted; indeed it cannot be denied. As to donations *inter vivos*, it has never been doubted, that delivery of the thing intended to be given is indispensable; and the same principle is now equally well settled in relation to donations *mortis causa*. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor with the legal power

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and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiæ* (which must be the case, when he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation, and that which is not a good and valid gift in law, cannot be made good in equity.

Proceeding upon this principle, the relief sought in *Mary Tate vs. Hilbert*, and *Jane Tate vs. Hilbert*, 2d Vesey, Jr. 112, was refused where a man, a short time before his death, gave one a check on his banker, which was no presented before his death, and to the other a promissory note, both of them being his relations. They were strong cases, particularly that of the check, which, if it had been presented before the death of the deceased, would have been paid, the *banker* having sufficient funds in his hands.

But the money, the thing that was intended to be given, not having been delivered, they were not good and available donations in law; the promissory note and the check being only evidences of contract, they did not transfer the possession of the money, nor invest the persons to whom they were respectively given, with the legal dominion over it, which continued in the deceased until his death, when the property vested in the executors. A promissory note delivered as a donation, is not a vested gift of the money, but only a promise or engagement to give; and imposes no stronger obligations, nor affords a better ground of action, than a promise to deliver any chattel as a gift. Such intended donations cannot be enforced on the consideration of blood, which has been insisted on in this case, and was probably a leading motive with the defendant's testator; in the cases referred to, in 2d Vesey, Jr. 112, *Mary Tate* and *Jane Tate* being stated to have been his relations.

The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood, or natural love and affection there must be something more; a valuable consideration, or

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it is not good and cannot be enforced at law, but may be broken at the will of the party. And being void at law for want of a sufficient consideration, Chancery cannot sustain and enforce it. The cases of *Mary Tate*, and *Jane Tate vs. Hilbert*, have been mentioned as striking cases, in which the Lord Chancellor manifested a strong desire, more than once expressed, to grant the relief prayed; a desire not foreign from us, so far as sitting here we are permitted to entertain it, but we are, as he then was, restrained by the settled and stubborn rules of law. The case of *Ward vs. Turner*, 2d. *Vesey, Sen.* 431, is just this case. It was a bill to compel a transfer of *South Sea* annuities, the receipt for which had been delivered to the complainant's testator by one *Flog*, saying, "I give you, *Mosely*, these papers, which are receipts for *South Sea Annuities*, and will serve you after I am dead." It was argued for the complainant that the delivery of these receipts, with the strong words of gift accompanying it, was as much as could be done towards giving the annuities, except a mere transfer in the books. But it was held that the annuities being the thing intended to be given, a delivery of the annuities was indispensably necessary to make it a good donation; that the delivery of the receipts was not sufficient, and that such a donation could not be made without a transfer, or something equivalent, that being the only mode in which stock or annuities are susceptible of being delivered.

It is supposed that this case differs from that, because, as is alleged, that *James Gittings*, at the time of delivering the certificate of stock to his daughter, endorsed his name upon the back of it (which does not appear to have been done by *Flog*, when he delivered the receipts for the annuities) which, it is contended, gave her authority to write over it a full assignment or a power of attorney, which would have enabled her to go to the bank, and cause a transfer of the stock to be made to her on the books. But it is not perceived that this makes any difference, nor is it necessary to inquire whether that endorsement gave any such autho-

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rity; if it did, it never was executed. It appears upon the face of the certificate itself that the stock was transferable at the bank only, and it is admitted that the endorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate, that was the subject of the intended gift, it matters not whether the endorsement was in full or in blank; for, as in the case of the check on the banker, which not being presented and paid in the life-time of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the check might, by presenting it in the life-time of the maker, have obtained the money, and thus perfected the gift; so here, even if by the endorsement of the certificate, whether filled up or remaining in blank, *Mrs. Patterson* might have gone to the bank in the life-time of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery. It was not a valid gift in law, otherwise there would have been no necessity for going into Chancery to perfect it. And being void in law, Chancery cannot interpose to make it good or enforce it. If *Mr. Gittings* was alive, it could not be seriously contended, that he could be compelled to transfer the stock in the absence of any consideration; and the same principle applies to his executor. His death does not make that good, which was bad before.

DECREE AFFIRMED, WITH COSTS.

Watkins' Adm'rs vs. State uso Shaw, Adm'r of Wells.—1830.

WATKINS' Adm'rs vs. STATE uso SHAW, Adm'r of WELLS.
June, 1830.

I and P, were joint executors of W, who left a son, for whom I was also appointed guardian. In an action brought by the administrator of that son on the guardian's bond, against one of P's sureties, it appeared that many years before the commencement of the suit, the joint executors had received a considerable amount of assets, but had not settled any account with the Orphans Court, and that P was dead: HELD, that P's guardianship ceased with the death of his ward, and as it did not appear that he died after P, and after I became sole executor, the action could not be sustained.

Where a sole executor sustains the two fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the Orphans Court, or not.

But where there is a joint executorship, this construction of law cannot consistently with principle prevail: because his co-executor is entitled to the possession of the assets equally with the guardian, and the property of his ward cannot be legally considered in his hands, until he has actually received it.

ERROR to Anne Arundel County Court.

This was an action of *debt*, brought on the 25th of October, 1815, in the name of the State, at the instance, and for the use of *James Shaw*, surviving administrator of *Richard W. Wells*, against the appellant's intestate, *Nicholas Watkins* of *Thomas*, after whose death, *Rachel H. Watkins*, and *Benjamin Watkins*, the present appellants, as his administrators, became parties to the suit, on a bond, executed by a certain *John Boyd Watkins*, as guardian of the said *Richard W. Wells*, in which the intestate of the appellants was a surety, dated on the 12th day of September, 1803, conditioned as follows: "That if the above bounden *John Boyd Watkins*, as guardian to *Richard W. Wells*, of *Anne Arundel County*, shall faithfully account with the Orphans Court of said county, as directed by law, for the management of the property, and estate of the orphan under his care, and shall also deliver up the said pro-

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perty, agreeably to the order of said Court, or the direction of law, and shall in all respects perform the duty of guardian to the said *Richard W. Wells*, according to law, then the above obligation shall cease, it shall otherwise, &c." The defendants pleaded performance by the said *John Boyd Watkins*.—Replication, non-performance, and issue.

1. At the trial the plaintiff offered evidence, that the plaintiff's intestate was entitled to one-third part of the personal estate of *John Wells*, deceased; that *John Boyd Watkins*, was surviving executor of the said *John Wells*, and guardian to the plaintiff's intestate: he then produced a list of desperate debts, returned to the Orphans Court, by said *John Wells'* executors, and offered parol proof, of the solvency of *Jacob Franklin*, one of the debtors in that list, for the purpose of charging the defendant with the plaintiff's proportion of said debt, but the Court (KILGOUR and WILKINSON, A. J.) were of opinion that such parol evidence was not admissible, to charge the defendant's intestate, as one of the securities in the guardian bond, on which this suit is brought. The plaintiff excepted.

2. The plaintiff then offered to read to the jury the following paper: "General Court: October Term, 1804, *Philemon Sherwood and John Boyd Watkins*, Ex'rs of *John Wells*, vs. *John Gassaway*: Judgment for £56 7 0 current money, debts and costs; to be released on payment of £28 3 6, current money, with interest from the 15th of September, 1798, till paid and costs:" which said paper was admitted to have the same legal effect and operation, as a full transcript of the record of proceedings in said cause; and also offered to prove, by competent evidence, that said *Gassaway*, against whom said judgment was rendered, was, at the time of the rendition thereof, and for many years afterwards, in solvent circumstances, and possessed of visible property, and that the amount of the said judgment might have been collected of said defendant. The defendant objected to this evidence, as inadmissible to charge the defendant's intestate as one of the securities in the guardian's bond, on which

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this suit is brought. The court sustained the objection, and the plaintiff excepted.

3. The plaintiff then proved, that *John Boyd Watkins*, who was the guardian of the plaintiff's intestate, appointed by the Orphans Court of *Anne Arundel County*, was one of the executors of *John Wells*, to one-third of whose estate, after payment of debts and legacies, the plaintiff's intestate was entitled; that letters testamentary on the estate of the said *John Wells*, were granted to said *John Boyd Watkins*, and a certain *Philemon Sherwood*, on the 17th of June, 1803. The plaintiff then, to prove his claim, read in evidence to the jury, the inventory returned by the executors aforesaid, on the 26th of July, 1803, and an account of sales dated the 16th of December, 1803, and shewing that assets, came to the hands of the executors to the amount of \$5244 77 after deducting the specific bequests. The plaintiff offered no evidence of any settlement by the executors in the Orphans' Court, and no proof that such settlements have not been made there by the executors. The defendants objected, that said inventory and account of sales returned as aforesaid, and without shewing the settlements in the Orphans Court, could furnish no evidence of the amount of the distributive share to which the plaintiff's intestate was entitled, so as so charge therewith the security in the guardian's bond, and so prayed the Court to instruct the jury. The Court refused this prayer, being of opinion that the inventory and account of sales were evidence of themselves, unless settlements with the Orphans Court were produced of the amount of the distributive share of the plaintiff's intestate, and would entitle the plaintiff in this cause to recover one-third part thereof, unless the defendants entitle themselves by legal proof, to deductions from the amount thereof. The defendants excepted.

4. The plaintiff having produced the inventory of the estate of *John Wells*, and account of sales, as stated in the former bills of exceptions, which it is agreed shall be taken as a part of this bill of exceptions, and having rested his

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claim upon that evidence. The defendants proved that *Sarah*, the daughter, and one of the residuary legatees of *John Wells*, intermarried with *Philip Sherwood*, one of the executors, before the death of her father. That *John Boyd Watkins*, the other executor, was appointed by the Orphans Court, guardian to *John H. Wells*, another of the children, and residuary legatees of the said *John Wells*. They also proved that *Richard H. Wells*, the plaintiff's intestate, died a few years after his father, and while an infant. They further produced, and read in evidence to the jury, an account passed by the Orphans Court, the 10th day of December, 1817, and then gave in evidence to the jury the writ issued in this cause, on the 25th day of October, 1815; and they thereupon prayed the Court to instruct the jury, that if they should be of opinion from the evidence in the cause, that the daughter aforesaid of the said *John Wells*, married *Philemon Sherwood*, one of the executors of the said *Wells*; and that *John Boyd Watkins*, the other executor, was appointed guardian to *John H. Wells*, another of the children, and residuary legatees of the said *John Wells*; also that the said plaintiff's intestate died a very few years after the death of his father, and was an infant at the time of his death, and that the aforesaid settlement of the estate of the testator with the Orphans Court, took place on the 10th day of December, 1817, more than two years subsequently to the institution of this suit, then the plaintiff is not entitled to recover in this suit, a distributive share of the estate of the said *John Wells*, which, by the will of the said *John Wells*, was left to the plaintiff's intestate. The Court refused to give this instruction. The defendants excepted, and the verdict and judgment being against them, they brought the present writ of error.

The cause came on to be argued before BUCHANAN, Ch. J., and EARLE, STEPHEN and ARCHER, J.

Magruder and *Randall*, for the appellants, insisted,

1. That the proof contained in the third exception, would

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have given to the appellee, an action against the executors, and their securities in the testamentary bond, but did not entitle the plaintiff to recover the "one-third part thereof," in an action against the security in the guardian's bond. 2. Upon the last exception they contended, that the proof gave to the plaintiff a clear action for the sum claimed against the executors, and their securities, but no right of action on the guardian's bond, the same being evidence that no settlement, and distribution of the estate of *John Wells*, had been made in the life-time of the appellee's intestate, and therefore his share of the estate was in the hands of the two executors, not in the hands of one of them only, and in his character of guardian.

On the first point they referred to *Barker vs. Parker*, 1 Term Rep. 287. *Pearsall vs. Summerset*, 4 Taunt. 592. *Leadley vs. Evans*, 9 Ser. and Low. 306. The act of 1798, Ch. 101, Sub. Ch. 11, Sec. 1. Sub. Ch. 12 and 5. *Drury vs. Conner*, 1 Harr. and Gill, 224. *Quynn vs. The State use of Pue*, 1 Harr. and Johns. 36. *Ellicott, et. al. vs. The Levy Court*, Ib. 359. *Wilson vs. Boyer*, Ib. 297. *State use of Key vs. Jordan*, 3 Harr. and M'Hen. 179. 2 Harr. Entries, 326. *Downes vs. State use of Tilden*, 3 Harr. and Johns. 239. *Seegars, Ex'r vs. State use of Betton*, 6 Harr. and Johns. 162. 1 Rool's Rep. 51. *Stilwell vs. Mills*, 19 Johns. Rep. 304. *Wiser vs. Blachly*, 1 Johns. Ch. Cas. 607.

Alexander and Flusser, for the appellee, on the first point, cited, *Dukehart, Ex. vs. The State*, &c. 4 Harr. and Johns. 506. 2 Philips Ev. 296. 2 Fonb. 184. *Bishop vs. Chichester*, 2 Bro. Ch. Cases, 163. *State use Key vs. Jordan*, 3 Harr. and M'Hen. 179. *Seegars, Ex. vs. State use of Betton*, 6 Harr. and Johns. 162. The act of 1798, Ch. 101, Sub. Ch. 111, sec. 16. *State use of Chamberlaine's Ex. vs. Wright*, 4 Harr. and Johns. 148. *Frederick vs. Frederick*, 1 P. Wms. 710. *Lechmen vs. Earle of Carlisle*, 3 Ib. 215.

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STEPHEN, J. delivered the opinion of the Court.

This action was instituted against *Nicholas Watkins*, of *Thomas*, the appellant's intestate, one of the sureties of *John Boyd Watkins*, now deceased, to recover from him, in his character of surety for said *Watkins*, as guardian to *Richard W. Wells*, the appellee's intestate, a certain sum of money, charged to be in the hands of *Watkins*, his principal, and for which it was charged he had not accounted according to law. This sum of money was claimed to be recovered by the appellee, as administrator of *Richard W. Wells*, one of the representatives of *John Wells*, deceased, who by his will appointed *John B. W.*, and *Philemon Sherwood*, his joint executors. It no where appears when *John Wells*, the testator, died; but it appears that letters testamentary on his estate were granted to the said *John B. W.*, and *Philemon S.*, on the 17th day of June, 1803. It was also proved, that *Richard W. W.* died a very few years after his father, and while an infant. An inventory of the estate was returned by the executors, on the 26th day of July, 1803, and an account of sales dated the 16th December, 1803, shewing that assets came to the hands of the said executors, to the amount of \$5244 77, after deducting the specific bequests. No proof was offered of any settlement in the Orphans Court, prior to the institution of this suit, which was commenced on the 25th October, 1815. It does not appear by any proof in the cause, when *Philemon S.*, the co-executor of *Watkins*, died, the pleadings and the evidence being perfectly silent as to that fact. This suit being instituted on the guardian's bond, the question which this Court is called upon to determine is, whether, upon the above statement of facts, the administrator of the ward was entitled to recover? This Court are of opinion that where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property then in his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a

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final account has been passed by the Orphans Court, or not; upon the principle, that what the law has enjoined upon him to do, shall be considered as done, and from that time he holds the ward's proportion of the property, by operation of law, in that character in which he would be entitled to receive it, upon a final completion of his trust as executor. But where, as in this case, there is a joint executorship, this construction of law cannot, consistently with principle, prevail; because his co-executor is entitled to the possession of the assets, equally with himself, and the property of his ward cannot be legally considered in his hands, until he has actually received it. As to the powers and rights of co-executors, see *Toller on Ex.* 359: "Co-executors, we may remember, (he observes) are regarded in law as an individual person; and by consequence, the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all; for they have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors, is valid, and shall bind the rest."

In this case, it is true *John B. W.* survived *Sherwood*, his co-executor, but it does not appear by the evidence in the cause, that his ward was then living, (which fact it was incumbent on the plaintiff to prove,) and if he was dead, his guardianship had expired, and he was no longer accountable in that character.

JUDGMENT REVERSED.

Stoddert vs. The Vestry of Port Tobacco Parish.—1830.

STODDERT vs. THE VESTRY OF PORT TOBACCO PARISH.
June, 1830.

In an action by a Vestry of a Church, (a corporation) to recover the price of a pew, it appeared by the evidence of one of the members of the Vestry, that he had acted as auctioneer in the sale of the pews, and had put down in pencil, at the time of the sale, on paper, the name of the purchaser, the defendant, and the price at which a pew was bid off. This memorandum was delivered to the Register of the Vestry, who transcribed it in the record book of their proceedings, returned it to the witness, who had made diligent but unsuccessful search for it, and believed it was lost: HELD, that parol evidence of the price of the pew, and that it was sold on a credit of twelve months, bearing interest from the time of sale, as it would have established a different contract from that contained in the memorandum, was not competent to go to the jury, and that the corporation were authorised to employ one of its members as an agent, and of course there was no want of legal competency in such member to be an agent for the purchaser in making the memorandum required by the statute of frauds, and that it was unnecessary for the plaintiff, to shew their title to the pew.

APPEAL from *Charles* county Court.

Assumpsit by the Vestry of *Port Tobacco* Parish, the appellee, against *John T. Stoddert*, the appellant, instituted on the 7th of March, 1825. The declaration alleged, "that whereas heretofore to wit, on the 29th June, 1818, at, &c. the said *John T. Stoddert*, was indebted to the said Vestry in the sum of \$300, current money, for a certain pew, No. 14, in *Christ Church*, in *Port Tobacco* Parish aforesaid, situate in *Charles* county aforesaid, before that time bargained and sold by the said Vestry, to the said *John T.*, together with the rights and privileges to the said pew appertaining, and at the special instance and request of him, the said *John T.*, to wit, &c., at, &c., and being so indebted to the said *John T.*, in consideration thereof, afterwards to wit, on, &c., at, &c., undertook to, and then and there faithfully promised, &c." The defendant pleaded *non assumpsit*, on which issue was taken.

1. At the trial the plaintiff proved by a witness, who, it was admitted by the plaintiff, was, at the time of the sale, a

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member of the Vestry of *Port Tobacco* Parish; that he acted as auctioneer in the year 1818 or 1819, when the defendant was the highest bidder for a pew in *Christ* church in *Port Tobacco* Parish, and it was struck off to him at the price of \$300, on a credit of twelve months, with interest from the time of sale. That he, the witness, put down in pencil at the time, on paper, the name of the purchaser, and the price at which it was bid off. That the witness delivered the memorandum thus made out, to the Register of the said Vestry, who transcribed it in the record book of their proceedings. He also proved that the said memorandum was then delivered to witness, who had made a diligent but unsuccessful search for it, and believed it was lost. The record of the Vestry was then read in evidence to the jury, for the purpose of proving said sale. The defendant then prayed the Court to exclude, as incompetent, the parol evidence of the said witness, as to the said sale and purchase of the said pew at the auction aforesaid; but the Court permitted it to go to the jury. The defendant further prayed the Court to instruct the jury, that the auctioneer at the sale, being one of the Vestry, who were the vendors, could not make such a memorandum as would gratify the requisitions of the statute of frauds, in relation to the sale of real estate. The Court refused the prayer. The plaintiff then proved that the defendant had been heard to offer the said pew in exchange for a pew in a different church, but gave no other evidence of possession or ownership by the defendant, who thereupon prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, having offered no evidence of right or title to said pew, but the Court refused to give the instruction as prayed, and the verdict and judgment being for the plaintiff, the defendant prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., MARTIN and ARCHER, J.

Stonestreet, for the appellant, contended,

1. That the County Court erred in permitting parol evidence to go the jury, to prove a contract for the sale of an interest in real estate. *Randall's Peake*, 234 (note.) 2 *Wheat. Selw.* 641. 2. That the memorandum in writing, made by the auctioneer at the time of sale, was not sufficient to prove the contract. 2 *Saund. Plea. and Ev.* 52. 2 *Campb.* 205. 2 *Wheat. Selw.* 741. 3. That the auctioneer being one of the vendors of the estate, cannot be presumed to be the agent of both parties, so as to make his memorandum of the sale evidence of the contract.

Chapman, for the appellee, on the first point cited *Sugden on Vend.* 66, 67. 2 *Phillips' Ev.* 398, 399. On the third he referred to 1 *Phillips' Ev.* 58. And to show that the acts of the appellant amounted to such a performance as bound him, he referred to *Sugden on Vend.* 84.

ARCHER, J., delivered the opinion of the Court.

The parol evidence offered of a sale of a pew was inadmissible, because it would have established a contract different from that contained in the lost memorandum. No parol evidence is admissible to add to, or vary the memorandum. In the second prayer submitted to the consideration of the Court below, no point is raised on the sufficiency of the memorandum of sale, except that it is objected that the witness, being one of the corporation, could not act as agent. As it regards the memorandum, the contents of which have been offered in evidence, we shall not express an opinion, but confine ourselves to the particular point raised. We think there can be no question of the right of a corporation to employ one of its members as an agent, and of course, no want of legal competency existed in such member to be an agent. He cannot be considered in the impossible, and therefore absurd position, as has been urged, as agent for himself; but must be viewed as acting in his individual capacity for a corporation. And if the corporation

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could constitute him their agent, there is nothing in his peculiar relation to it, which would disable him from being (within the meaning of the statute) an agent for the purchaser also, for his interest being a corporate interest, could not disqualify him from acting in this latter capacity. Nor do we deem it necessary that the plaintiffs should have offered evidence of their right and title to the pew to enable them to recover.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

THE PLANTERS' BANK OF PRINCE GEORGE'S COUNTY vs.
SELLMAN.—*June, 1830.*

In an action against the endorser of an inland bill of exchange, payable after date, which had been protested for non-payment, and due notice thereof given to the defendant, a letter from the plaintiff to the administrator of the drawer of the bill, dated some time after the bill became due, was given in evidence by the defendant, which stated that the plaintiff "had agreed with the drawer to secure the amount of the said bill, and others, drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due"—HELD, that in the absence of proof of any consideration to support the agreement mentioned in the letter, the County Court erred in giving an unqualified instruction to the jury, that the defendant was discharged from all liability.

The holder of a bill of exchange may by an agreement with the drawer to give him further time for payment, discharge an endorser.

But it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser after he has been fixed in his responsibility by non-payment, and due notice given.

It is clear, both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend the holder's remedy, and restrain him from bringing suit against the drawer before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights.

To do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties.

The Planters' Bank of Prince George's County vs. Sellman.—1830.

APPEAL from *Anne Arundel County Court*.

Assumpsit by the holders, the appellants, against the appellee, *John Sellman*, the endorser of an inland bill of exchange, commenced July 17th, 1826. The general issue was pleaded.

At the trial the plaintiffs read in evidence the following bill of exchange: “\$550. *Tracey's Landing*, August 2d, 1823. Thirty days after date, pay to *John Sellman*, or order, five hundred and fifty dollars, for value received, and place the same to my account. *T. Tongue*. Messrs. *B. D. and R. Mulliken*, *Baltimore*. Endorsed, *John Sellman*. Pay to *James L. Hawkins*, Esquire, Cashier, or order. *T. Tyler*, Cashier. Accepted, *B. D. and R. Mulliken*.” And proved the hand-writing of the defendant, the endorser of the said note. They also proved, that the same was in due time presented for acceptance, and was accepted; also the demand of payment of the drawer, protest for non-payment and notice thereof to the defendant in due time. The defendant thereupon read in evidence, a letter written by the Cashier of the *Planters' Bank of Prince George's County*, the plaintiffs in this cause, bearing date the 10th February, 1826, and directed to the administrator of the drawer, *Thomas Tongue*, informing him that the plaintiffs had agreed with the said *Thomas Tongue*, to receive the amount of the said note, and other notes drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due.

Thereupon the defendant by his counsel prayed the Court to instruct the jury, that by reason of the said agreement with, and extension of credit to the drawer aforesaid, without the consent of the defendant, the latter was discharged from all liability, and their verdict must be for the defendant, of which opinion the Court (*KILGOUR* and *WILKINSON*, A. J.) were, and so instructed the jury.

The plaintiffs excepted, and the verdict and judgment being for the defendant, the present appeal was taken.

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The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

Magruder, for the appellants, contended,

That admitting that such an agreement, as that referred to in the bill of exceptions, founded on a valuable consideration, would have discharged the endorser, yet in this case, it was an agreement without any consideration, *nudum pactum*, and therefore does not release the endorser. *McLemore vs. Powell*, 12 *Wheaton*, 554, 556.

Alexander, for the appellee.

In the case in *Wheat.* there was positive proof of the absence of consideration. In this case, the letter of the cashier of the appellants speaks of an *agreement*, and that term imports a consideration. *Wain vs. Warlters*, 5 *East*. 10. The word agreement being introduced in the record, must receive its technical definition. *Cabell vs. Vaughan*, 1 *Saund.* 291, (*note* 1.) *Tongue*, the drawer, was bound by his agreement to pay the bills, by instalments as stipulated, and if he was *bound*, so was the bank, mutuality being of the essence of the contract. The promise by *Tongue* was to pay a precedent debt, or rather debts, first consolidating them and thereby changing the nature of his original undertaking. He referred in his argument to *Clopper vs. Union Bank of Maryland*, 7 *Harr. and Johns.* 100. *Cro. Chas.* 504, 548. *Gould vs. Robson and Keymer*, 8 *East.* 576. *Wheat. Selw.* 36. *Boulton vs. Stubbs*, 18 *Ves. Jr.* 20. *Rees vs. Berrington*, 2 *Ves. Jr.* 540.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This suit was originally brought on a bill of exchange drawn by *Thomas Tongue*, on Messrs. *B. D. and R. Mulliken*, payable to the defendant, *John Sellman*, or order, and by him endorsed to the plaintiff, and protested for non-payment, of which due notice was given to the defendant. The general issue was pleaded, and at the trial the defen-

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dant gave in evidence a letter written by the Cashier of the *Planters Bank of Prince George's County*, to the plaintiff, dated after the protest for non-payment and notice, and directed to the administrator of *Tongue*, the drawer, informing him that the plaintiff had agreed with *Tongue* to receive the amount of that bill, and other notes drawn by him, and protested, in instalments of \$300, every sixty days, and requiring payment of two instalments then due. And upon the prayer of the defendant's counsel, the Court below instructed the jury, that by reason of that agreement with, and extension of credit to the drawer, without the consent of the defendant, the defendant was discharged from all liability, and their verdict must be for him. To this instruction a bill of exceptions was taken on the part of the plaintiff, on which the only question presented to this Court arises; and that is, not, whether the holder of a bill of exchange may, by an agreement with the drawer, to give him further time for payment, discharge the endorser, which is a doctrine too well settled now to be examined, but what kind of agreement it must be to work that effect. And we think it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser, after he has been fixed in his responsibility by non-payment, and due notice given; but clear both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend his remedy, and restrain him from bringing suit against the drawer, before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights—and to do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties for a moment; but (like any other agreement that is void for want of consideration,) not being binding on the holder, he is not restrained from suing, but is left free to prosecute his rights, as if no such agreement to extend the time of payment had been made. And the ground upon which an extension of time by the holder

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to the drawer is held to discharge the endorser after notice of non-payment, being, that the agreement for delay ties up the hands of the holder, and suspends his present rights; it follows, that an agreement which, for want of consideration, is not obligatory on the holder, and does not suspend his remedy or rights, will not have the effect to discharge the endorser. *Chitty on Bills*, 371, 373, (ed. 1821,) 379, (note C.) *Arundel Bank vs. Goble*. *Walwyn vs. St. Quintin*, 1 Bos. and Pull, 652. *McLemore vs. Powell*, 12 Wheat. Rep. 554. And why should it? The holder is under no obligation of active diligence. As long as he is passive, all his remedies remain, and he may forbear to sue as long as he pleases; and such forbearance will not operate to discharge the endorser, whose rights are not suspended; but by paying the bill he may regain the possession, and reinstate himself in the ownership of it, and thus become entitled to a remedy on the instrument, against all the antecedent parties. So in the case of a naked agreement by the holder to give time, which being void for want of consideration, is not binding upon him, and does not suspend the rights or remedies of any of the parties. And being therefore no more to the prejudice, and not affecting the rights of the endorser, more than a mere forbearance by the holder to sue, without any express agreement, there is no reason why the endorser should be discharged in one case, more than in the other. But not so in the case of a valid agreement for delay, having a sufficient consideration to support it; which being binding on the holder suspends his remedy on the bill, until the expiration of the time agreed upon. And if in the mean time the endorser discharges the bill, he only places himself in the situation of the holder, with no other rights, and he takes the bill subject to all the equity of the drawer, as against the holder himself, whilst it was in his hands, whose right to sue was suspended by the agreement. Such an engagement therefore does injuriously affect the rights of the endorser, and discharges him from his liability, if made without his concurrence. The only evidence in the record

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in this case, touching the agreement relied upon by the defendant, between the plaintiff and *Tongue*, the drawer, for an extension of credit, is that which is furnished by the letter of the Cashier of the plaintiff, which does not inform us upon what consideration, if any, that agreement was made; if it was for a sufficient consideration, and binding upon the plaintiff so as to restrain him from bringing suit, the defendant was thereby discharged from his liability as endorser; an agreement to receive the amount of the bill by instalments being clearly an agreement to give time; but if on the contrary it was for want of consideration *nudum pactum*, and not obligatory upon the plaintiff, his remedy was not suspended, and the endorser therefore was not discharged. And in the absence of proof of any consideration to support it, we think the Court before whom the cause was tried, erred in the unqualified instruction to the jury, that the defendant was discharged from all liability.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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G obtained judgment by confession against W, as executor, who thereupon stayed execution by a writ of error and bond. While the case was pending in the appellate Court, the executor died, and the writ of error was abated. The executor, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* of the first deceased, did not find assets sufficient to discharge the debt. In an action upon W's testamentary bond, against his surety, for the use of G, a replication disclosing the above facts, was held sufficient on general demurrer and a compliance with the act of 1720, *ch. 24.*

In this case the defendant rejoined, "that the said executor had no goods or chattels which were of the deceased testator, at the time of his death in his hands to be administered, nor had at any time thereafter:" HELD, on demurrer, that this rejoinder could not be received as a general plea, extending over the whole time from the death of the testator to the death of the executor, that no goods of the deceased ever came to the executor's

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hands; for its relative expressions "nor at any time thereafter" evidently indicated a particular point of time, when the executor was without goods or chattels with which to pay the debt, as they implied a period of time when he had such goods and chattels—that it could only be considered as a plea of *plene administravit*, or a substitute for such a plea, and as such, it was materially defective.

Upon general demurrer, it is the duty of the Court to look to, and adjudicate upon all the pleadings in the cause.

The confession of a judgment by an executor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but in relation to his surety, in his testamentary bond, it is only *prima facie* evidence, either as to the debt, or sufficiency of assets to pay it.

ERROR to *Anne Arundel* County Court.

This was an action of *debt* instituted on the 4th day of September, 1823, in the name of the State use of *George Mackubin*, on the testamentary bond of *William Warfield*, executor of *Thomas Warfield*, bearing date on the 5th of April, 1819, against the appellant, *James Iglehart, Junior*, one of the securities in said bond. To the plea of general performance by the defendant, the plaintiff filed the following replication: "for plea nevertheless by way of replication, the said State saith, that at a County Court of *Anne Arundel* County, begun, &c. on the 3d Monday of April, 1822, the said *George Mackubin*, named in the endorsement of the original writ in this cause, at whose instance and for whose use the same was impetrated, by judgment of the said Court, recovered by confession against the said *William Warfield*, by the name of *William Warfield*, late of said County, merchant, executor of the testament and last will of *Thomas Warfield*, deceased, as well the sum of \$11,313 50, a certain debt, as the sum of \$6 52, as for his costs and charges by him about his suit, in that behalf laid out and expended, to be levied of the goods and chattels which were of the said *Thomas* at the time of his death, in the hands of the said *William*, remaining to be administered, if so much thereof in the hands of the said *William* to be administered he had, and if so much thereof in his hands to be administered he had not, then the costs and charges

aforesaid to be levied of the proper goods and chattels of the said *William Warfield*; and the said *George Mackubin* did then and there agree to release the said judgment, upon the payment of the sum of \$5656 75, current money, with interest thereon from the 19th day of November, 1818, and the said costs; as by the record and proceedings of the said Court now remaining at the city of *Annapolis*, aforesaid, manifestly appears, which said judgment, in form aforesaid rendered, was for a just and *bona fide* debt, due to the said *George Mackubin* by the said *Thomas Warfield*, in his life-time, and then and not yet being paid or in any manner satisfied; and the said judgment still remains in full force and effect, no ways reversed or annulled. And that after the death of the said *Thomas*, and at the time of rendering the said judgment, the said *William* as executor as aforesaid, had of the goods and chattels, which were of the said *Thomas* at the time of his death, in his hands to be administered, to the value of the debt, costs and charges aforesaid, in the said judgment and release thereof mentioned, wherewith the said *William*, executor as aforesaid, the said debt costs, and charges aforesaid, could have satisfied, to wit, at *Anne Arundel* County aforesaid. And the said State further saith, that after the rendition of the said judgment, to wit: on the 28th day of June, 1822, the said *William Warfield*, for reversing the said judgment, prosecuted and sued forth out of the High Court of Chancery of this State, a certain writ of the State, for correcting errors in the record and process, and also in the rendition of the said judgment, directed to the judges of *Anne Arundel* County Court aforesaid. By which said writ the said judges of the said County Court were commanded, that if judgment be thereof rendered, that then the record and process of the said plea, with all things touching the same, under their seals distinctly and openly they send, and that writ, so that the same might be had before the judges of the Court of Appeals for the Western Shore, to be held at the city of *Annapolis*, on the first Monday of December, then

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next, that the record and process aforesaid being inspected into, the judges of the Court of Appeals might further do therein for the correcting of that error, which of right and according to the laws and customs of this State ought to be done. And the said *William Warfield*, immediately on suing out the said writ of error as aforesaid, entered into bond with sufficient sureties approved by the Chancellor in double the sum recovered by the said judgment, with a condition “that if the said *William Warfield* should not pursue the directions of the act entitled, ‘An act for regulating writs of error, and granting appeals from and to the Courts of common law within this province,’ at the next Court of Appeals for the Western Shore, and prosecute the same writ with effect, and also satisfy and pay, to the said *George Mackubin*, his executors, administrators and assigns, in case the said judgment should be affirmed, as well all and singular the debt, damages and costs adjudged by the said County Court, as also all costs and damages that should be awarded by the said Court of Appeals, then that the said bond should be and remain in full force and virtue, otherwise of no effect.” By virtue of which said writ of error the said judges of the said County Court here, afterwards to wit, on the said 8th day of June, 1822, transmitted the record and process of the plea and judgment aforesaid, with all things touching the same, unto the judges of the said Court of Appeals at the city of *Annapolis* aforesaid. After which, and before the said judgment was affirmed by the said Court of Appeals, the said *William Warfield* died, and such proceedings were had on the said record in the said Court of Appeals, that at June term, 1823, of the said Court, the said *William Warfield*’s death was suggested, and the said writ of error abated, and was entered abated, as by the said record and proceedings in the said Court of Appeals remaining, more fully appears. And the said State further saith, that after the death of the said *William Warfield*, to wit, on the 24th day of January, 1823, administration of all and singular the goods and chattels, rights and credits which

were of the said *Thomas Warfield* at the time of his death, left unadministered by the said *William Warfield*, deceased, executor as aforesaid, was by the Orphans Court of *Anne Arundel* County, in due form of law granted to the said *James Iglehart, Jun.* and one *David Ridgely* of the County aforesaid; who on the 11th day of March, 1823, at the County aforesaid sold, and returned to the said Orphans Court in due form of law an account of their sales of, all the goods, chattels and personal estate of the said *Thomas Warfield*, left unadministered by the said *William Warfield*, deceased, executor as aforesaid, which came to their hands to be administered, amounting to the sum of \$71 74½, which said sum is not sufficient to pay to the said *George Mackubin* the said sum of \$5656 75, current money, with interest thereon from the 19th day of November, 1818, and the said sum of \$6 52 costs, in the said judgment, and the release thereof mentioned. And the said State further saith, that after the death of the said *William Warfield*, to wit: on the 2d day of November, 1822, administration of all and singular the goods and chattels, rights and credits which were of the said *William Warfield*, deceased, at the time of his death, was, by the Orphans Court of *Anne Arundel* County, granted to a certain *John W. Duvall* of the county aforesaid; who, on the 12th day of November, 1822, returned to the said Orphans Court in due form of law, an inventory of the goods, chattels and personal estate of the said *William Warfield*, amounting to the sum of \$5943 62½, and an additional inventory amounting to the sum of \$489 33, and on the 3d day of March, 1823, an account of the sales of all the said goods, chattels and personal estate, amounting to the sum of \$5855 79; and on the 9th day of April, 1824, duly returned to the said Court a list of debts due from the said *William Warfield*, amounting to the sum of \$12,420 96, and the said State saith that the amount of the said sales, and of all the goods and chattles, rights and credits, and personal estate, which were of the said *William Warfield* at the time of his death, are

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not sufficient to discharge and pay to the said *George Mackubin*, the said sum of \$5656 75, current money, with interest thereon from the said 19th day of November, 1818, and the said sum of \$6 52, costs in the said judgment, and the release thereof mentioned, and also to discharge and pay the other debts due from the said *William Warfield* at the time of his death. And the said State further says, that execution of the judgment aforesaid, yet remains to be made to the said *George Mackubin*. Nevertheless the said *William Warfield*, as executor as aforesaid, although hoften thereunto requested, by the said *George Mackubin*, hath not yet paid or satisfied to the said *George Mackubin*, the debt, damages, costs and charges aforesaid, in the judgment aforesaid mentioned; but hath altogether refused to pay the same to the said *George Mackubin*. And so the said State says, that the said *William Warfield*, executor as aforesaid, hath not paid the debts of the said *Thomas Warfield*, which he did owe at the time of his death, so far forth as the goods, chattels and credits, which were of the said *Thomas Warfield* at the time of his death, would extend, and the law would charge, as he ought to have done, but hath wasted and misapplied the same, contrary to the form of the condition of the writing obligatory aforesaid; and this the said State is ready to verify, &c. Wherefore, &c.”

To this replication the defendant rejoined as follows:

“And the said *James Iglehart, Jr.* comes, &c. and as to the replication of the said State he saith, that the said State ought not, &c. because he the said *James* saith, that the said *William Warfield* in the condition of the writing obligatory mentioned, had no goods or chattels which were of the said *Thomas Warfield*, at the time of his death, in his hands to be administered, nor had at any time thereafter, and this he is ready to verify. Wherefore he prays judgment, &c.” General demurrer by the plaintiff to the defendant’s rejoinder, and joinder in demurrer. The County Court ruled the demurrer good, and rendered judgment for the

plaintiff. Whereupon the defendant sued out the present writ of error.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

Magruder and *Shaw*, for the appellant, contended,

1. The court below erred in ruling the demurrer to the defendant's rejoinder to be good. 2. That the matters set forth in the replication do not preclude the appellant from shewing a deficiency of assets of the estate of *Thomas Warfield*. 3. That the appellee cannot maintain this action, it being too rigorous a prosecution of the testamentary bond. 4. That the first error in pleading was committed by the appellee. 5. That the rejoinder is good. 6. That the appellant cannot be made responsible beyond the condition of his bond.

By demurring to the plea of no assets, the plaintiff has admitted, that the executor confessed a judgment when there were not sufficient assets in his hands, and this admission by the plaintiff should do away the effect of the judgment, as evidence of assets against the executor. If, however, the judgment should be deemed conclusive as against the executor, it cannot be so with respect to his surety, otherwise the rule that no man shall be bound by a judgment which he could not defend, will be destroyed. This is not like the case of a surety on an appeal bond, who stipulates positively to pay, if the judgment be affirmed. The actual amount of the assets is the limit of the responsibility of the surety, and the executor cannot extend it, by confessing judgment for a larger amount. Confessions in court are entitled to no more weight than confessions out of court. They are merely *prima facie* evidence. *Drummond vs. Prestman*, 12 *Wheat.* 515. It does not follow, that because the party confessing the judgment is concluded, that others interesting in defeating it, shall be equally concluded. 2 *Bro. Ch.* 610. If the defendant cannot plead a want of assets,

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then the judgment against the executor must be an *estoppel*, and in that case, it should have been pleaded as such. 2 *Chitty Plea*. 592. The plea of no assets, is a legal defence, and the defendant should be allowed the benefit of it, unless he has once before had an opportunity of doing so, and waived it, but this is not the case, as he is now for the first time in Court—the judgment set forth in the replication does not amount to an admission of assets—it is nothing more than an admission of the debt, *Act* 1798, *ch.* 101. The replication does not show the estate to be insolvent—the list of debts returned is not evidence of their existence, and many of them may have been defeated; 1820, *ch.* 174, *sec.* 7. In proceeding against a surety, it is indispensable to show a *devastavit*, by the executor—now non-payment of a debt is no *devastavit*, because the executor may not have been able to get in the assets, 1 *Saund.* 219, (*B*) note 8. The replication does not charge that the administrator *d. b. n.* of *Thomas Warfield*, had not paid the debt, and he was the party to pay upon the death of *William*, the first executor, during the whole of whose life the debt was in litigation; if the administrator *d. b. n.* is the party liable, then the plaintiff has sued the wrong person, and his replication is totally defective. They referred to the *Acts of* 1820, *ch.* 24—1802, *ch.* 101, *sec.* 1—1806, *ch.* 90—1815, *ch.* 149. *Seegar vs. The State*, 5 *Harr. and Johns.* 488. *Quym vs. The State*, 1 *Harr. and Johns.* 37. *M'Mechen vs. Mayor of Baltimore*, 2 *Harr. and Johns.* 41. *Johnson vs. State*, 3 *Harr. and M'Hen.* 223. *Beall vs. Beck*, *Ib.* 242. 1 *Com. Dig.* 215. 3 *Stark. Ev.* 1387, note (3.) *Ib.* 1300. 1 *Phil. Ev.* 242, 248. *Drummond vs. Prestman*, 12. *Wheat.* 515.

Taney (Att'y Gen'l) and *Brewer, Jr.* for the appellee.

1. The case is so presented by the record, that this Court cannot reverse the judgment. The *Act of* 1825, *ch.* 117, was designed to make the Court of Appeals purely an appellate Court, and the appellant must show, that the points

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which he urges here, were actually raised, and decided by the County Court; now the question of assets, and whether there was a *devastavit* or not, do not appear to have been raised in the Court below—the decision there, may have been on the defectiveness of the rejoinder. 2. The judgment is conclusive as to assets, whatever may be said of the *devastavit*, and being conclusive, supposing both the replication and rejoinder to be good, the plea of *plene administravit*, or no assets, could not be pleaded. 3. Whenever an executor or administrator is bound, *de bonis propriis*, his sureties are equally bound—if this suit was against the administrator, he would be held liable *de bonis propriis*, and if so, the sureties being liable in the same bond, and for the performance of the same duties, are equally bound. If there be any case in which a judgment against one person, should be evidence against another, it is a case of this sort—the party against whom the judgment must first be obtained, is he who has the best, and only means of disputing either the debt, or assets—suppose the creditor is defeated in his suit against the administrator, is he not bound by it? can he afterwards sue the security?—he certainly could not, and it would seem to be right, that as a judgment in favor of the administrator would be conclusive evidence for him, that a judgment against the administrator should be conclusive against him. 4. But suppose the judgment is only *prima facie* evidence, still the judgment below must be affirmed—the replication states a good cause of action, and the rejoinder is defective in not averring that the administrator had no assets, at the time of the institution of the suit—2 *Saund.* 216, note (1.) It is not pretended that a *nulla bona* was indispensable to suing the bond. *Act* 1820, *ch.* 24—they referred also to 2 *Chitty Plea.* 451, the *Act of* 1802, *ch.* 101, *sec.* 1. 1 *Saund.* 219, (A) note (8) (C.) *Erving vs. Peters*, 3 *Term. Rep.* 685.

EARLE, J., delivered the opinion of the Court.

The controversy between these parties, arises from an action by the appellee against the appellant, as a surety in the testamentary bond of *William Warfield*, executor of *Thomas Warfield*, to recover the amount of a judgment obtained against the executor. The judgment was appealed from, and pending the appeal the executor died, not leaving sufficient estate to pay his debts. All this matter is set forth at large in the replication, as well as an administration *de bonis non*, on the unadministered estate of *Thomas Warfield*, which amounted to a very trifling sum, wholly inadequate to the payment of the appellee's judgment. To this replication the defendant, now the appellant, put in a rejoinder, (*ante* 240) which drew from the adversary pleader a general demurrer, and its legal sufficiency is the first question to be decided by this Court. This rejoinder is clearly not to be received as a general plea of *nulla bona devenerint ad manus*, extending over the whole time from the death of the testator to the death of the executor for its relative expressions, "nor at any time thereafter," evidently indicate a particular point of time, when the executor was without goods or chattels with which to pay the debt, as they imply a period of time, when he had such goods and chattels. We can consider it only as a plea of *plene administravit*, or a substitute for such a plea, and so considering it, the plea appears to us to be materially defective. The point of time, when the executor was without goods or chattels to answer the demand against him is not specified, and is left in uncertainty and doubt; and the plea omits the words "and that he had not any goods or chattels of the testator, on the day of issuing out of the original writ, or ever after," which words are essential, and without which, it is bad on demurrer. 2 *Saund. Rep.* 216, note 1. A general demurrer having been put in to the rejoinder, it became the duty of the Court below, to look to, and adjudicate upon all the prior pleadings in the cause, and presuming they did so, we proceed in the next place to examine the re-

plication in the record, and give our ideas of it. The matter of this plea is ample, comprising all that is made requisite by the act of 1720, *ch. 24*, with which we have carefully compared it; and it appears also to us to be well pleaded. The *fieri facias* was arrested by the appeal, and no return of course was made of *nulla bona*, but its equivalent is fully stated, and satisfactorily demonstrates, that the creditor was remediless by any other reasonable means, save that of suing the testamentary bond. Our judgment must consequently be in affirmance of the judgment of *Anne Arundel County Court*; yet before we leave the case, we think it right in a short way to express our opinion on a point argued before us, which is closely connected with this subject, and is interesting to the public to be settled. The confession of a judgment by an exêcutor is conclusive on him, as well as to the debt confessed, as to the sufficiency of the assets to pay it; but what legal effect it has on the rights of his surety, in the testamentary bond, is the question to be solved? Not being a party to the judgment, he cannot be concluded by it, although his liabilities depend on the acts and confessions of his principal. It seems to us, therefore, that in determining his rights, the judgment against the executor, ought to be considered to have but a *prima facie* influence, either as to the debt recovered, or the sufficiency of the assets to pay it. As to him it is nothing more than the declarations or confessions of the principal, clothed with legal solemnities, and should only be deemed in all respects correct, until the contrary is made to appear. This opinion is in accordance with *Drummond vs. Prestman*, 12 *Wheat.* 519, and apparently so, with a case there cited, from 15 *Massa. Rep.* 6, which book unfortunately we have been unable to procure. It is opposed, however, to *Beall vs. Beck*, 3 *Harr. and M'Hen.* 242; unless that case is to be understood, as construed by the Supreme Court of the *United States* in *Drummond vs. Prestman*, in which sense we acknowledge its authority.

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THE STATE OF MARYLAND vs. SCRIBNER, and STATE vs.
BARKER.—*June, 1830.*

By the *Act of 1826, ch. 251*, declaring that “It shall not be lawful for any person within this State, to have in possession any ticket of any lottery, not granted or permitted by this State, with intent to sell, negotiate or dispose of the same, to sell, negotiate, or advertise in any way whatever, any *such* ticket or part of a ticket, &c.” it was the great object of the legislature to prevent the sale of unauthorised tickets, and for that purpose the law prohibited both the possession of such tickets with intent to sell, and the selling of them: HELD, therefore, that the word “*such*,” did not refer to the possession of the seller, as part of the description of the ticket which it would be unlawful to sell, for that would legalize the selling of tickets by any person, who at the time of the sale had not possession, and defeat the obvious intent of the law.

In an indictment under the above Act of Assembly, the lottery ticket or part of a ticket should be set out—the sale of only such tickets, as are not authorised by the State, is prohibited, and it would be proper that the ticket should be set out, that the Court might see whether it were a ticket, the sale of which was authorised or prohibited.

In all cases of larceny, very particular descriptions of the goods taken have never been considered necessary, and the description given in the law which enacts the offence in statutable larcenies, has in general been deemed sufficient—this doctrine is founded partly on the fact that the prosecutor is not considered as in the possession of the article stolen, and is not therefore enabled to give a minute description; and principally because notwithstanding the general description, it is made certain to the Court from the face of the indictment, that a crime has been committed, if the facts be true.

ERROR to *Baltimore City Court.*

The indictment in the first case stated, “that *Samuel Scribner*, late of the said city, a dealer in lottery tickets, on the 7th day of May, in the year 1828, with, &c., at, &c., did sell to a certain *Nathaniel F. Downing*, within this State, a certain ticket, being then and there part of a lottery ticket of a certain lottery, then and there called the *Union Canal Lottery*, fourth class, for 1828, and then and there numbered 11, 25 and 33, and which said lottery was not then and there of a lottery granted, or authorised by this State, contrary to the form of the Act of Assembly in

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such case, made and provided, and against the peace, government and dignity of the State.” The *second* count stated “that the said *Samuel Scribner*, late of, &c., on the 7th day of May, in the year 1828, with, &c., at, &c., did negotiate with a certain *Nathaniel F. Downing*, one quarter ticket of a certain lottery, called the *Union Canal Lottery*, fourth class, for the year 1828, which said quarter ticket, was then and there a part of a lottery ticket, of the lottery aforesaid, numbered 11, 25 and 33, and was then and there of a lottery not granted, or authorised by this State, contrary, &c.” Third *count* “that the said *Samuel Scribner*, late, &c., on the 7th day of May, 1828, with, &c., at, &c., was concerned with a certain other person, to the jurors unknown, in negotiating a part of a ticket, to wit, one quarter of the ticket, numbered 11, 25 and 33, of a certain lottery, then and there called the *Union Canal Lottery*, fourth class, for the year 1828, which said lottery then and there was not granted or authorised by this State, contrary, &c.” The defendant pleaded not guilty, and there was a special verdict which stated the facts of the case, but which need not be repeated here, further than that the paper sold by *Scribner* was as follows: “*E pluribus Unum*, No. 1, Policy of Insurance—Sir, please transfer to order of ———, that part of the policy of insurance of No. 1, effected at your office, on my account, which relates to, and insures the payment of such prize as may be drawn to quarter 11, 25, 33, as therein named, in *Union Canal Lottery*, 4th class, for 1828. *S. Scribner*, 182. *D. D. Arden*, *Washington City*.”

A motion was then made, on behalf of the said *Scribner*, in arrest of judgment, which stated among other reasons, that the writing charged to be negotiated by the traverser, and that given in evidence to the jury, are neither of them set forth in the indictment, and because the indictment does not charge the lottery ticket, or part of a lottery ticket therein mentioned, to have been in the possession of the traverser, nor is there any such fact found by the jury.

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The City Court, (BRICE, Ch. J., M'MECHAN and NISBET, A. J.) sustained the motion in arrest.

The indictment in the *second* case charged "that *Ephraim Barker*, late of the city aforesaid, a dealer in lottery tickets, on the 26th day of May, in the year 1828, with, &c., at, &c., did sell to a certain *Nathaniel F. Downing*, within this State, a certain ticket, being then and there part of a lottery ticket, of a certain lottery, then and there called the *Grand Consolidated Lottery*, sixth class, for the year 1828, and then and there numbered 26, 39 and 44, and was then and there of a lottery not granted, or authorised by the laws of this State, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace, government, and dignity of the State." The second *count* charged "that the said *Ephraim Barker*, late, &c., on the 26th day of May, 1828, with, &c., at, &c., did negotiate with a certain *Nathaniel F. Downing*, one quarter ticket of a certain lottery, called the *Grand Consolidated Lottery*, sixth class, for the year 1828, which said quarter ticket, was then and there part of a lottery ticket of the lottery aforesaid, numbered 26, 39, 44, and was then and there of a lottery not granted or authorised by this State, contrary, &c. concluding as the first count. Third *count*, "That the said *Ephraim Barker*, late, &c., on the 26th day of May, 1828, with, &c., at &c., was concerned with a certain other person, to the jurors unknown, in negotiating a part of a lottery ticket, to wit: one quarter of the ticket numbered 26, 39, 44, of a certain lottery, then and there called, the *Grand Consolidated Lottery*, sixth class, for the year 1828, which said lottery, was not then and there authorised, or granted by this State, contrary," &c. concluding as the first count.

To this indictment the defendant, *Barker*, demurred, and the City Court ruled the demurrer good, whereupon, the present writs of error were sued out by the State.

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These causes came on to be argued together, before BUCHANAN, Ch. J., EARLE, STEPHEN, and ARCHER, J.

Taney (Att'y Gen'l.) and *Gill*, for the State, contended,

1. That the paper writing set forth in the special verdict is a lottery ticket in effect.

2. That in an indictment for selling a lottery ticket, it is not necessary to set out such ticket. They referred to the act of 1826, *ch.* 251, by which they said three distinct offences were created, and prohibited.

1. The being in possession of a ticket of an unauthorised lottery, with intent to sell. 2. The actually selling of such a ticket, and 3. The being concerned with any other person in such sale. The Legislature intended to put down the sale of these unauthorised tickets; and they forbid not only the being in possession with intent to sell, but the sale of them, even through the intervention of a third person, and though the seller might not be in the possession of them. The object of the Legislature was two-fold; the one was to protect our citizens from the hazards and losses of adventuring in distant lotteries, and the other to increase the revenue derived from the sale of domestic tickets. Upon the subject of the interpretation of penal laws, they referred to 5 *Wheat.* 76, 94, 96. *Cox Digest*, 641, *sec.* 32, 33. They referred also to the Act of 1819, *ch.* 163. In the case against *Scribner*, the City Court decided, that the question whether the paper was a ticket, or not, was a question of law. They referred to *Johnson's Dictionary*, definition of ticket, to show that the paper set out in the special verdict, is a lottery ticket. To show that the ticket need not be set out in the indictment, they cited, 2 *Harr. and Gill*, 407. They referred also to *U. States vs. Gooding*, 12 *Wheat.* 474, 476, the act of 1809, *ch.* 138, *sec.* 6. 1 *Stark. Ev.* 217.

Mitchell and *Gwynn*, for the defendants in error, contended, 1. That the question to be decided is, whether it is

lawful to transfer the policy of a ticket, when the assignment is not to be made in the State. The policy they said was effected beyond the jurisdiction of the State, and the transfer was equally beyond it. The holder of a lottery ticket, and the holder of a policy, look to different securities; the first looks to the manager of the lottery; the latter to the underwriter. The assignor of a policy, guaranteeing the payment of a prize, has no interest in the ticket. They insisted, that a law prohibiting an act, not *malum in se*, cannot be said to be evaded. Where the thing is indifferent in itself, the forbidding act can be extended no farther than its very letter will carry it. The principles of criminal justice should be so clearly established, as that whilst the citizen may abstain from what it forbids, he may enjoy what it permits. The question then, is, what does the Legislature forbid? They say you shall not have a foreign ticket in your possession, and that you shall not sell *such ticket*. The word *such*, means a foreign ticket in possession of the vendor. The law does not say, you shall not sell foreign tickets at all, but that you shall not sell them whilst you are in possession. *U. States vs. Gooding*, 12 *Wheat.* 476. The word *such* applies to the whole description, and therefore the unauthorised ticket must be in possession of the party, or the mere fact of selling is no offence under the statute. *King vs. Munoz*, 2 *Strange*, 1127. 1 *East. P. Crown*, 453. 1 *Hale*, 660. 2 *Leach*. 890. 2. The indictment should have averred that the ticket was not drawn. 2 *East. P. C.* 601, 600. To show that the indictment should have set the ticket out, they referred to 1 *Stark. C. Law*, 143, 144. 2 *East. P. C.* 1114. 2 *Maul. and Selw.* 386. 1 *Leach*. 377. *Davy vs. Baker*, 4 *Burr.* 2471. They referred also to the act of 1809, *ch.* 154. 1826, *ch.* 228. 3 *Barn and Cress*, 183. 1 *Black. Com.* 88. 1 *Chitty C. Law*, 198. The act of 1828, *ch.* 129, *sec.* 16, and 1826, *ch.* 67.

ARCHER, J. delivered the opinion of the Court.

We conceive that there cannot be a reasonable doubt about the construction of the act, upon which these indictments are framed. They are founded upon the act of 1826, *ch.* 251, which is as follows: "It shall not be lawful for any person within this State, from and after the passage of this act, to have in possession any ticket, of any lottery, not granted or permitted by this State, with intent to sell, negotiate, or dispose of the same, *to sell, negotiate or advertise, in any way whatever, any such ticket*, or part of a ticket, or in any way or manner, or as an agent, factor, broker, or attorney, for or on behalf of any other person, or persons, to aid, assist, or in any way to have any concern, with any other person in selling any ticket, in any lottery, not granted or authorised by this State." The great object of the Legislature was to prohibit the sale of unauthorised tickets, and for that purpose the law prohibits both the possession of such tickets with intent to sell, and the selling of them. To give such an interpretation to the law, as would make the word "such" refer to the possession of the seller, as part of the description of the ticket, which it should be unlawful to sell, would legalise the selling of tickets by any person, who at the time of sale had not the possession. Such an interpretation would defeat the obvious intent of the law. The phraseology of the law, although its construction (being a criminal law) must be strict, does not demand such an interpretation. By the use of the word "such," it was intended to refer to that which had been previously described,—a ticket in a lottery not granted or permitted—that it should be in possession of the seller is no part of the description of the ticket, and the word "such," does not refer to the possession, and it is not therefore necessary to charge the fact of possession in an indictment which makes the sale the alleged offence.

But we conceive that the lottery ticket, or part of a ticket, should be set out in the indictment. It must be recollected that the sale of all lottery tickets are not prohibited by law;

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it is only the sale of such as are not authorised by the State; and it would be proper that the ticket should be set out, that the Court might see whether it was a ticket, the sale of which was authorised, or prohibited. It has been supposed, that there can be no greater reason for setting out the lottery ticket in such cases as these, than there would be to set out a bank note in the case of an indictment for larceny of a bank note; but such cases appeared to stand on peculiar grounds. In all cases of larceny, very particular descriptions of the goods taken, have never been considered necessary; and the description given in the law which creates the offence, has in general been deemed sufficient. If one be indicted for stealing a handkerchief, it will not be necessary to describe either its dimensions, or its colour; or if he be indicted for stealing a piece of cloth, it would not be necessary to give its length, breadth, or colour; and this doctrine is founded in part, probably on the fact, that the prosecutor is not considered as in possession of the article, and is not therefore enabled to give a minute and particular description. But in the case before the Court, the presumption of possession would be the reverse, and there would be no inability, or difficulty, to give a minute description, or to set out the instrument.

But the principal reason upon which this law in relation to indictments for larceny is founded, is because, notwithstanding this general description, it is made certain to the Court, from the face of the indictment, that a crime has been committed, if the facts be true. As in the case put of a larceny of bank notes, it is punishable to steal the note of any bank. The crime therefore appears complete, be it the note of what bank it may—so in the other cases put, a crime appears upon the face of the indictment, if the allegation that a handkerchief, or piece of cloth has been stolen, be true, without any other description, for be its kind what it may, it is equally a felony. But had the statute made it felony to steal the note of a particular bank, it would perhaps, notwithstanding the difficulty in general, of giving

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a particular description of any stolen article, have been necessary to have set it out, in order that the Court might see whether it was a note of such a description, that a larceny of it might be committed.

These principles will be found to be applicable to all offences, created by statute, where it does not contain a complete description of the offence. As in cases where the counterfeiting of certain instruments, is made forgery. The instrument is set out that the Court may see whether it is within the statute. So also where frauds by means of false tokens, and false pretences are punishable, as there are false tokens, and false pretences not punishable, it is demanded that the particular tokens and pretences be set out, that the Court may see whether the offence is brought within the statute. And the same doctrines [are applicable to indictments, under the statute of 9 *Geo.* 1 *ch.* 22, for sending menacing letters. The letters must be set out. Now applying these principles to the cases before the Court, for any thing that appears to the Court upon the face of these indictments, the tickets there referred to may have been authorised by the State. It is true, that there is an averment that they are unauthorised, but this will not be sufficient. The tickets must be spread out, that the Court may perceive whether they be authorised or not; for if this sweeping averment were received, that which is matter of law, would be given to the determination of the jury.

JUDGMENTS AFFIRMED.

State of Maryland vs. Wayman, and Wayman vs. the State.—1830.

THE STATE OF MARYLAND vs. WAYMAN, and WAYMAN
vs. THE STATE.—*Cross Appeals.*—June, 1830.

All appointments to office, under the constitution, by the executive of the State, are made by the authority of the 40th, 48th and 49th sections, and the Register in Chancery not being commissioned during good behavior, is necessarily an officer of annual appointment, under the 49th section.

The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed he is not legally an incumbent of the office, and cannot lawfully perform any of its duties.

Where the constitution limits the duration of an officer to a certain term, no irregularities in the proceedings of the appointing power, can extend it beyond that period.

By the 49th article of the Constitution of Maryland, "all civil officers of the appointment of the Governor and Council, who do not hold commissions during good behavior, shall be appointed annually in the third week in November; but if any of them shall be re-appointed, they may continue to act without any new commission or qualification; and every officer though not re-appointed shall continue to act until the person who shall be appointed and commissioned in his stead shall be qualified." Under this clause, B was commissioned as Register in Chancery, in January, 1812, and gave bond on the 24th January, 1816, in conformity to the *Act of 1742, ch. 10*, the condition of which was such, that "if above bounden B, whilst he shall continue in the office of Register, shall," &c. discharge various enumerated duties, and that in case of death, or that he shall be legally dismissed from officiating longer in the said office, he or his executors, &c. shall surrender to his successor all the records, &c. "made during the time he hath officiated in the said Register's Office." He continued to hold the office and discharge its duties without any re-appointment, until 1821, and omitted to record proceedings and decrees of the Court, of which it was his duty to keep records, during every year he was in office. These records were afterwards completed at the public expense, and an action was brought on his bond against his security, to recover the money expended by the State: HELD, that the bond was executed with an express reference to the provisions of the Constitution, and that its condition did not create a responsibility beyond them; that its object was to engage for a faithful discharge of duties as long as they could be legitimately performed under the official grant and no longer, and that the defendant was responsible under the bond for the conduct of B, as Register of the Court of Chancery, to the expiration of the third week in November, 1816.

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A recital in the condition of a bond may restrain indefinite expressions used in it, and adapt them to the intention of the parties.

Where a surety is sued upon a bond, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages for the detention of the debt from the time the debt is demanded—that is the import and effect of his contract, and his accountability cannot be stretched beyond it.

It is not in every case that interest by way of damages is to be recovered on the penalty, and when the case occurs, it may be considered as an exception to the general rule, which limits the recovery by the penalty in the bond.

Where a jury is called upon to assess the damages for breaches assigned or proved in the condition of a collateral bond, and are wholly unauthorised by the issue to find damages for the detention of the debt, a recovery must be limited to the penalty of the bond.

Where various persons have distinct demands secured by the same bond, a recovery and payment in one suit can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty, and in particular cases by the penalty and interest.

In an action upon the official bond of the Register of the Court of Chancery by the State, for omitting to make the proper record books, a recovery may be had for omissions to record proceedings in suits to which the State was not a party, and on account of which nothing was paid to such Register by the State. The measure of damages is the sum paid by the State for doing that, which the officer should have done.

The records of our Courts of Justice are to be considered as public property, and so important is it to the community, that they should be made up correctly, and preserved with care, that when a neglect in these particulars occurs, an obligation is imposed on the State to supply the defect, and have the work done at the expense of the treasury. The defaults of the officers, are thus visited on the public, and their bonds afford the only means of security for the State to resort to against loss.

Evidence which leaves the mind in doubt, whether by a further search, certain record books sought for, might not have been regained, is not sufficient to let in parol evidence of their contents.

Where it was the duty of the Register in Chancery to make and keep records of the proceedings of his Court, his report to the Chancellor that he had made such records, and the statement of the Chancellor on the minutes of the Court, that such records had been made up, do not constitute primary evidence to shew that such records were made, and in the absence of satisfactory proof of the loss of the record books themselves, are not admissible as secondary evidence of the same fact, nor is the estimate of a subsequent Register, made by the direction of the Legislature, of the sum it would require to furnish a substitute for such record books, nor his evidence that the same had been all correctly made up, admissible under such circumstances.

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The constitution is to be construed with reference to the laws existing at its adoption and the practice under them.

APPEAL from *Anne Arundel* County Court.

This was an action of *debt*, brought on the 23d of September, 1825, in the name of the *State of Maryland*, against *Henry Wayman*, on the following bond, which was duly certified by the Clerk of the Court of Appeals, to be a true copy from the original on file in his office. The defendant pleaded general performance—replication, non-performance and issue.

“*Maryland, scilicet.* Know all men by these presents, that we, *Thomas Hamilton Bowie, Jesse Ray, Francis T. Clements* and *Henry Wayman*, of *Anne Arundel* County, are held and firmly bound unto the *State of Maryland*, in the full and just sum of two thousand six hundred and sixty-six dollars and sixty-six cents and two-thirds of a cent, current money, to be paid to the said *State of Maryland*. To the which payment well and truly to be made and done, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and sixteen. The condition of the above obligation is such, that if the above bounden *Thomas Hamilton Bowie*, whilst he shall continue in the office of Register of the Court of Chancery, shall, at his own proper cost and charge, find a supply of good and sufficient record books necessary for the entering up of all matters and things relating to such Register of the Court of Chancery office, and shall and will make or cause to be made and entered, true, legal and perfect records and entries, according to the truth and nature of the matter or thing requiring to be entered or recorded—and shall duly and carefully look after, sustain, preserve, repair and maintain, all the several books, papers and records now being and remaining in the said office, as also those that from time to time during his continuance in the said office shall be added thereunto, in such manner as

that in case of death, or that he shall be legally dismissed from officiating longer in the said office, he the said *Thomas Hamilton Bowie*, his executors or administrators, shall surrender and deliver up, or cause to be surrendered and delivered up to the next person who shall succeed him in the said Court of Chancery or Register's office, all the papers and record books now being in the said Register's office, in good order and repair; as also all such other papers and record books, which shall be by him added in like good order and repair, with the records and entries faithfully, legally, and truly made up and entered *during the time he hath officiated in the said Register's office*; without favor or affection, but according to the truth, the nature of the thing and the duty of his office, and all other the duties of his said office legally, duly and faithfully discharge, according to law, and the true intent and meaning of the Acts of Assembly in such cases made and provided—that then the above obligation to be void and of none effect, or else to be and remain in full force and virtue in law.”

1st. EXCEPTION. The plaintiff proved that *Thomas H. Bowie*, the obligor in the condition of the writing obligatory mentioned, was duly appointed and commissioned as Register in Chancery on the 23d January, 1816, and continued to hold the said office and discharge the duties thereof, without any re-appointment, until the — day of 1821. That he received no other appointment to the said office, except the one above mentioned, and continued until his death to hold and exercise the said office, under the aforesaid appointment. That in 1816, and every other year after he received his said appointment until his death, he omitted to record proceedings and decrees which it was the duty of the Register of the Court of Chancery for the time being, by law, to record, and nevertheless sent out and collected and received his fees for recording proceedings which never were recorded by him, and which have since been recorded by the *State* at the public expense, and for which

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the *State* has paid between \$5,000 and \$6,000. That the amount of fees improperly charged and received by the said *Bowie*, during the time he so held the office, amounted to the sum of about one thousand pounds current money. Whereupon the plaintiff prayed the opinion of the Court, that the plaintiff is entitled to recover in this action, for the failure of the said *Thomas H. Bowie*, to record all proceedings from the date of his said bond to the time of his death, which it was the duty of the Register of the said court, for the time being, to record. 1st. Because under the appointment above mentioned, he was lawfully the Register of the said court until his death, without any new appointment, and the bond in question therefore continued in force until his death. 2d. Because the condition of the said bond, by its terms, covers the whole time he continued in office under the original appointment, or a succession of annual appointments. 3d. Because the condition is broken, if all the papers and record books which were by him added while he held the office, in manner above mentioned, were not at his death in good order and repair, with the records and entries for all that time, faithfully, truly, and legally made up and entered—which opinion and direction the Court [DORSEY, Ch. J., KILGOUR and WILKINSON, A. J.] refused to give—but were of opinion, and so directed the jury, that the defendant in this cause cannot be charged with any such alleged default of the said *Thomas H. Bowie*, arising subsequently to the expiration of the third week in November, in the year 1816. The plaintiff excepted.

2d. EXCEPTION. In addition to the evidence stated in the first bill of exception, the plaintiff offered in evidence, that the *State* had sustained damage to the amount of more than \$4000, by the default of the said *Thomas H. Bowie*, as Register in Chancery, committed before the end of the third week in November, 1816; and thereupon the plaintiff prayed the opinion and direction of the Court to the jury, that if they find, from the evidence, that the *State* has sustained damage to the amount of \$4000, by the default of

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the said *Thomas H. Bowie*, as Register in Chancery, committed before the end of the third week in November, 1816, contrary to the condition of the bond, on which this suit is brought, that then the plaintiff is entitled to recover the above mentioned sum of \$4000, notwithstanding the penalty of the said bond is only one thousand pounds. Which opinion the Court refused to give; but were of opinion, and directed the jury, that the plaintiff was not entitled to recover more than one thousand pounds, the penalty of the bond; (the opinion on this exception was given *pro forma*, by consent—) The plaintiff excepted.

3d. EXCEPTION. In addition to the evidence before stated in the preceding bills of exceptions taken by plaintiff, the plaintiff by its attorney offered the resolution of the General Assembly of Maryland, for 1822, No. 66. “Whereas it appears that many of the papers and proceedings in the Chancery office, remain unrecorded during the time that *Samuel H. Howard*, *Nicholas Brewer*, *James P. Heath* and *Thomas H. Bowie*, acted as registers of said Court, and which papers they ought to have had recorded, inasmuch as they received payment for the same by the parties interested therein; therefore, *Resolved*, That the present Register in Chancery be, and he is hereby authorised and required, to proceed to examine all the unrecorded papers in his office, and ascertain as near as practicable, the probable cost of recording said papers, calculating the cost at the same rate he now receives per side, for recording papers of a similar nature, and report the result of his examination to the Governor and Council, and also to the next Legislature, stating distinctly the amount it will cost to record the papers and proceedings which each of the aforesaid Registers ought to have had recorded, in compliance with the existing laws.”

The plaintiff also offered in evidence the report made by the Register in pursuance of this resolution. “Chancery office, 17th December, 1823: In obedience to a resolution of the *General Assembly of Maryland*, passed at the last

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session of the Legislature, directing the Register of the Court of Chancery to report to the next General Assembly, what will be the probable cost of recording all such papers as remain unrecorded, and which ought to have been recorded by each of the former Registers respectively, the Register begs leave to state, that in order to make such a report as appeared to him to have been contemplated by the Legislature by their resolution, he has found it necessary to examine individually, all the papers in his office remaining unrecorded. He has made this examination with great care and attention, and in the course of it has assorted the papers, and selected from the great mass of them, such as by the existing law are required to be recorded. These papers, which comprise about three-fourths of the whole, consist of all decrees passed since the year 1785, which direct a sale, conveyance or partition of lands, and real estate generally, for the recording deeds, and for the transfer of title under special acts of Assembly. The following as the result of his examination, the register respectfully reports for the consideration of the Legislature. The probable cost of recording such of the above mentioned papers as ought to have been recorded by *Samuel Harvey Howard*, Esqr. is estimated at \$4,500. The probable cost of such as ought to have been recorded by *Nicholas Brewer*, Esqr. is estimated at \$3,000. The probable cost of recording such as ought to have been recorded by *James P. Heath*, Esqr. is estimated at \$1,500. The probable cost of recording such as ought to have been recorded by *Thomas H. Bowie*, Esqr. is estimated at \$1,500. All which is respectfully submitted. *Ramsay Waters, Reg. Cur. Can.*”

And also offered in evidence the resolutions of 1825, No. 29, 73, 117; and the resolution of 1823, No. 14, and the resolution directing the Register to deliver the papers.

“No. 29. *Resolved*, That the Governor and Council be, and they are hereby authorised and required, to take under their superintendence the papers remaining unrecorded in the Chancery Office, and which should have been placed

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on record by *Samuel H. Howard, Nicholas Brewer, James P. Heath* and *Thomas H. Bowie*, Esqrs. late Registers in Chancery.

Resolved, That the governor and council be, and they are hereby authorised and required, to cause such of said papers as are required by law to be recorded, to be registered as soon as may be, in proper books to be procured for that purpose, and that such books of registry, after they are completed, be deposited and remain among the archives of said office.

No. 73. Whereas by resolutions of the present Assembly, the governor and council are authorised to procure certain valuable papers remaining in the Chancery office to be recorded: And whereas the governor and council entertain doubts of their authority under said resolutions to carry into effect the intention of the General Assembly in passing them; therefore,

Resolved, That the Governor and Council be, and they are hereby authorised and empowered, to contract in the name of the State, with some person or persons of integrity, understanding, and other proper qualifications, to discharge the labor and duties mentioned in said resolutions; and the Governor and Council are hereby authorised to draw quarterly and yearly as the work progresses, on the Treasurer of the Western Shore, which drafts the said treasurer is hereby directed to pay for such sums as may be necessary to meet the demands of the persons engaged in said work.

No. 117. *Resolved*, That the Register in Chancery be, and he is hereby authorised and required, before he deliver to the Governor and Council, or their order, any paper or papers in his custody, which by resolutions of the present General Assembly, the executive may be authorised to withdraw from his custody, to demand and receive a receipt, which shall sufficiently identify the said several papers and the cause or causes to which they relate; and the said receipt shall be sufficient in every case to discharge him from all responsibility on account of the safety or preservation

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of said papers, until the same shall have been returned to his charge and custody.

No. 14. *Resolved*, That if the said Registers in Chancery, clerks of the Court of Appeals, clerks of the several County Courts, Registers of Wills in the several counties of this State, and the clerk of the City Court of Baltimore, who have failed to record such papers as by them respectively ought to have been recorded, shall not complete the records of the same on or before the first day of January, in the year eighteen hundred and twenty-five, then that the Governor and Council be, and they are hereby authorised, to direct the Attorney General, to institute such suit or suits as may be necessary for the recovery of such demands as may be due by each or all of said Registers in Chancery, clerks of the Court of Appeals, clerks of the several County Courts, Registers of Wills in the several counties of the State, and clerk of the City Court of *Baltimore*.

Also the following proceedings of the executive: "*Saturday*, January 4th, 1826. The Council met. Present, His Excellency *Joseph Kent*, Governor, and the Honorable *Joseph Gabby*, *William Stewart*, *Robert H. Archer*, *Daniel Martin* and *John H. Steel*, members of the Council. *William D. Beall*, *George Brown*, *Isaac Hines*, *Henry Hobbs* and *Joseph Mayo*, appointed to record the papers mentioned in the resolution of the present session, at twenty-five per cent. less than the law allows for the performance of such labors; the whole to be executed under the superintendence of the Register of the Court of Chancery, who shall be answerable to the executive for the faithful execution of his trust, and receive as full compensation therefor twenty per cent. on said allowance, to be paid by deductions at that rate from the work done by each person appointed as above. Stationary to be furnished by the executive."

The following communication was received from *Ramsay Waters*, Esq. Register in Chancery, which was ordered to be entered upon the records of proceedings, viz:

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“Chancery Office, 6th March, 1826. To the Honorable the Executive of Maryland: Gentlemen. A communication from your honorable body has been handed to me this morning, and I have given to it the most respectful consideration. I understand the communication to be an offer from the executive of compensation for certain services which they wish me to perform. The nature and extent of those services, and the heavy responsibility they impose, have been well considered. I think the proposed compensation wholly inadequate, and therefore cannot consent to accept. Respectfully your obedient servant, *Ramsay Waters*.”

Whereupon the following proposition was made, adopted and signed by the Governor and Council, viz: “Council Chamber, Annapolis, March 6, 1826. *Ramsay Waters*, Esq. Register in Chancery, having refused to accede to the proposition made him by the executive, for superintending the recording of the Chancery papers mentioned in said proposition, the executive offered the same terms to Mr. *Thomas Culbreth*, Clerk of the Council, who accepted thereof, and is hereby ordered to take the papers mentioned in the resolutions of the General Assembly, to be recorded under his charge and superintendence, in such parcels as may be necessary for the due performance of the work, the same to be regularly listed and receipted for, and not to be taken out of the state house, and to be at all times subject to the examination of the Register in Chancery.” April 20th, 1826.—“Ordered, that *Ramsay Waters*, Register of the Court of Chancery, be authorised and required to deliver to each and any of the gentlemen appointed by the executive, namely, *William D. Beall*, *George Brown*, *Isaac Hines*, *Henry Hobbs* and *Joseph Mayo*, to record the unrecorded Chancery papers, under resolutions of the General Assembly, such portions of the said papers, dockets and other books relating thereto, as may be necessary to enable them to proceed with the said recording upon the order of *Thomas Culbreth*, under whose superintendence the papers have been placed by the executive.”

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No. 1. Extract from the proceedings of the Executive, May 7, 1825:

“*Ordered*, That the clerk write to the Attorney General, and direct him to commence suits against all Registers in Chancery, Clerks of the Court of Appeals, Clerks of the several County Courts, Registers of wills, and Clerks of the City Court of *Baltimore*, who have failed to record such papers as by them respectively ought to have been recorded, who have not completed the same agreeably to the resolution, No. 14, passed at December session, 1823.” And also offered in evidence the following letter to the Attorney General:

“In Council, Annapolis, May 7, 1825. Sir,—In compliance with a resolution of the General Assembly, passed at December session, 1823, No. 14, you are hereby directed to institute such suit or suits as may be necessary for the recovery of such demands as may be due from each and all of the officers mentioned in the said resolution, who have failed to record such papers as by them respectively ought to have been recorded, and who have not completed the records of the same. I have the honor to be, with due respect, your obedient servant, *Thomas Culbreth*, Clk. of the Council. *Thomas Kell*, Esqr. Attorney General.”

And the plaintiff also offered in evidence the original records made under the said resolutions and proceedings, and which have been by the said *Thomas Culbreth* returned to the Governor and Council and accepted by them, and now remain in the council chamber for the purpose of binding up before they are deposited in the Chancery office; and offered in evidence that they had cost the *State* between twenty-seven and twenty-eight thousand dollars, which has been paid by the *State*; and that the proceedings in Chancery before the end of the third week in November, 1816, required by law to be recorded by the said *Thomas H. Bowie*, and left unrecorded by him, have been recorded under the said resolutions, and accepted by the Governor and Council, and deposited in the council chamber as aforesaid; and produ-

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ced the said records here in Court, and offered in evidence that these last mentioned records cost the *State* about \$725, which it has paid to the persons employed to make the said records in the manner above mentioned. The defendant offered in evidence from the said records so produced, that many of the said cases improperly omitted to be recorded by the said *Bowie*, were suits between individuals to which the *State* was not a party, and in which the *State* had no other interest than what belongs to it as the guardian of the rights of its individual citizens. Whereupon the defendant by his counsel, prayed the Court to instruct the jury, that the plaintiff in this action is not entitled to recover from the defendant damages for the omission by *Thomas H. Bowie*, to record proceedings and decrees in suits to which the *State* was not a party, and on account of which nothing was paid to the said *Bowie* by the *State*, or by him demanded of it. Which instruction the Court refused to give. The defendant excepted.

4th. EXCEPTION. In addition to the evidence stated in the preceding bills of exceptions, the defendant to support the issue on his part, proved by *Ramsay Waters*, Register of the Court of Chancery, that there were two record books in the Chancery office, in which were recorded proceedings required to be recorded by *Mr. Bowie*. That he has searched for them in the office repeatedly, but never at the request of the defendant or his counsel, and that they are not now in the office; that he missed them out of the office last summer; that he does not know by whom they were taken out; that he has never made any particular search for them out of the office, because he supposed that they were in the hands of some of the persons engaged in recording the Chancery records above mentioned, and supposed they were in the hands of *Joseph Mayo*. And also offered in evidence by the said *Mayo*, that he does not recollect taking out the said books, and does not know that he ever saw them out of the office; that he saw some dockets in the committee room of the house of delegates, and these

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two record books may for aught he knows have been among them; that he supposed that all of these books had been returned to the Chancery Office, but does not know that they were; that he went to-day to examine the book cases in the committee room of the House of Delegates, but he found that the book cases were locked up, and the key said to be in the possession of *Gideon Pearce*, the Clerk of the House of Delegates, who resides in this place, but who is now on the Eastern Shore, and witness could not therefore make the examination he wished. The plaintiff also offered in evidence by *Charles Thompson*, a Clerk in the Office of the Register in Chancery, and who has been engaged as clerk in that office for three years, that more than three years ago he saw one of the record books of the time of *Thomas H. Bowie*, in the library in the State House, where they were recording the Chancery proceedings under the resolution of the Legislature; that witness was not at that time a clerk in the office of the Register in Chancery, and does not know what has since become of the book, and has never enquired for it. The defendant then offered in evidence by *Louis Gassaway*, the principal clerk in the office of the Register in Chancery, that the defendant yesterday, while his trial was going on, applied to him about the two record books made in *Mr. Bowie's* time; and the witness informed the defendant that they were not in the Chancery Office, but he believed that either *Joseph Mayo*, who was the principal agent under *Mr. Culbreth* for superintending the recording of the Chancery papers under the resolution of the Legislature, or some of those engaged in recording the Chancery papers, had them. The defendant further offered in evidence that he then applied to said *Mayo*, who said that they might be among the books and dockets that were in the committee room of the House of Delegates, which had been used by the clerks when employed in recording the Chancery papers, and that he would examine there for them; that witness went to examine last evening, but found the book cases locked, and

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learned on inquiry that *Gideon Pearce* the clerk of the House of Delegates, who has the key of the said book cases, is now on the Eastern Shore of this State, and witness was therefore unable to make the examination, and does not know whether the books are there or not. And after the aforesaid evidence was given, the defendant by his counsel, *offered* to read in evidence from one of the original minute books of the Court of Chancery, the following reports and orders:

“In Chancery, September Term, 1818.—On examination of the dockets and files in the office of the Register of the Chancery Court, laid before me in pursuance of the order of the 2d instant, it is ordered, with respect to the decrees, papers and proceedings in the time of *Thomas H. Bowie*, the present register, remaining unrecorded, that six hundred sides of the said decree, papers and proceedings from December term, 1815, ought to be recorded from the present time to the 31st instant, inclusive, an entry of which portion and period assigned the said register, is directed to make; and at the termination of the period above prescribed, to wit, on the first day of December term next, being the first day of the month, the book is to be brought before me for my determination, whether the records are made up in the manner required by the act of 1817, *ch.* 119. *W. Kilty, Chr.* November 5th, 1818.”

“In Chancery, December Term, 1818.—On the first day of December, 1818, that being the first day of this term, the Register submitted to the Chancellor the following report, in obedience to the foregoing orders. To the honorable *William Kilty*, Esquire, Chancellor of Maryland. In obedience to the several orders of your honor, dated the 5th day of November, 1818, relative to the decrees, papers and proceedings in the Court of Chancery: ‘That he now submits to your honor, for your inspection, two record books, which are marked, the one *Liber. T H B. No. 1*, and the other marked *Liber, T H B. Sales, No. A*—which books he has procured and in them recorded as

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he was directed, the number of sides of the decrees, papers and proceedings of the Court, during the time he has been Register, and remaining unrecorded, pointed out by your honor in that order, which relates to himself." *Thomas H. Bowie*, Reg. Cur. Can.

"In Chancery, December Term, 1818.—On considering the above and within report, and the books therein referred to, (relating to the decrees, papers and proceedings of *Thomas H. Bowie*, the present Register,) being brought before me according to the order, passed November 5th, 1818, I do determine from what appears, that the records are made up to the time, appearing in said books, in the manner required by the *Act of 1817, ch. 119, sec. 6*. It is further ordered, with respect to the decrees, papers and proceedings of *Thomas H. Bowie*, the present Register, that from this date to the first day of March term next, there ought to be recorded 4000 sides, commencing from the termination of what has been done under the former order. *William Kilty*, Chr. December 1st, 1818."

And the defendant then offered in evidence similar reports of the Register, and orders of the Chancellor thereupon, in the years 1819 and 1820.

To the admissibility of which said reports and orders in evidence for the purpose of proving that the said *Thomas H. Bowie*, had recorded any of the proceedings before the third week in November, eighteen hundred and sixteen, which he as Register in Chancery was bound by law to record, and which by the records produced appear to have been recorded under the direction of the Governor and council in the manner before stated, the plaintiff by his counsel objected—and the Court sustained the objection, and refused to permit the aforesaid entries in the said minute book, to be read in evidence for the purpose aforesaid. The defendant excepted.

5th EXCEPTION. In addition to the evidence stated in the preceding bills of exceptions numbered 1, 2, 3 and 4, the defendant produced as a witness, *Ramsay Waters*, Esq.

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the present Register of the Court of Chancery, who succeeded *T. H. Bowie*, and has been the Register ever since, and by him proved that in the year eighteen hundred and

he was directed by the General Assembly to report to the succeeding Legislature, an estimate of the probable costs of making up the records of the several Registers, and among the last, those of said *T. H. Bowie*; that he performed the duty with as much care and accuracy as he could, having till the next meeting of the General Assembly to complete it, and that according to the most accurate estimate he could make, the costs of making up the records of said office, whilst said *T. H. Bowie* was the Register, to wit, from 1st January, 1816, to February, 1821, would be \$1500. And the defendant then offered to prove by said *Ramsay Waters*, that according to that estimate it would have cost nothing to complete the records, for not completing which, this suit is brought, because the records for that period of time had been all correctly made up by the said *Bowie*, in his life-time—to the admissibility of such last mentioned parol testimony so offered, the plaintiff by his counsel objected—and the Court was of opinion that the same was inadmissible and rejected the same. The defendant excepted.

6th EXCEPTION. Upon the whole evidence stated in the preceding bills of exceptions, the plaintiff by his counsel prayed the opinion of the Court, that the books produced being records of the proceedings in the Court of Chancery, made out and recorded by the persons authorised and required by law to record the same, are of themselves *prima facie* evidence, that the papers and proceedings were such as the law required to be recorded by the said persons—and inasmuch as the defendant is liable for the default of the aforesaid *T. H. Bowie*, in not recording the proceedings in the Court of Chancery, which it became his duty between the date of his bond and the end of the third week in November, 1816, to record, that the plaintiff is entitled in this action to recover the damages sustained by the *State*,

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for such default of the said *T. H. Bowie*, and that the measure of damages is the sum paid by the *State* for recording the proceedings which it became the duty of the said *Bowie*, during the period last above mentioned to record, unless the defendant can shew by the inspection of the said books or other records of the Court of Chancery, that papers and proceedings have been illegally recorded in the books above mentioned, or that the *State* has paid an unreasonable sum for the said recording. To the giving of which instruction the defendant by his counsel objected, for admitting the right of the *State* to sue for the expenses incurred in the completion of said records—yet the whole of those expenses have been incurred since the institution of this suit. Because the papers which have been transcribed are not records, and have no right to be considered as such—and because said papers were selected by the persons who were merely appointed to transcribe the papers required by law to be recorded, and were not authorised to decide what papers ought to be recorded, and by the terms of the contract were to be paid according to the number of sides which they might record—and because the bond upon which this suit is brought, was not required by the Constitution, or any existing law, and therefore the defendant is not responsible under said bond, for the conduct of said *Bowie*, as Register of the Court of Chancery, for any period of time—and because the original papers have not been produced, and there is no proof that the copies have ever been examined or compared with the originals. But the Court gave the instruction as prayed by the plaintiff's counsel. The defendant excepted. Verdict and judgment for the plaintiff for \$652 12; both parties appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN and ARCHER, J.

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Tany, (Atty. Genl.) and *Boyle* for the State,

Contended, on the *first* bill of exceptions, that the plaintiff is entitled to recover, in this action for *Bowie's* failure to record all proceedings from the date of his bond to the time of his death, which it was the duty of the Register of the Court of Chancery to record.

1. Because under the appointment as Register of the Court of Chancery, he was lawfully the Register of the said Court until his death.

2. Because the condition of his bond as Register, by its terms covers the whole time he continued in office, under the original appointment, or a succession of annual appointments.

3. Because the condition is broken, if all the papers and record books, which were by him added, while he held the office in manner above mentioned, were not, at his death, in good order and repair, with the records and entries for all that time, faithfully, and truly, and legally made up, and entered.

On the *second* bill of exceptions, they insisted, that the *State* may recover, beyond the penalty of the bond, if more than the penalty of the bond should be proved to be due.

The great question arises on the *first* exception, which involves the enquiry, whether the office of the Register of the Court of Chancery, is an annual appointment. According to the practice, the appointment is not annually made; it follows, therefore, if the office is one to which the incumbent must be annually appointed, that for a long time since the adoption of the Constitution we have had no Register. They referred to the *Act of 1716, ch. 1, sec. 1, 3, 5; 1742, ch. 10, sec. 2, 3, 7—Constitution, Art. 10, sec. 49*. If the language of the Constitution is doubtful, then the contemporaneous construction, and continued practice of those who framed it, is entitled to great consideration. According to the Constitution the old officer is to continue to act, until a new one is appointed and qualified, and he holds in virtue of the old appointment—if then he may be

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required to act beyond the third week in November, it follows that his bond will continue answerable. If his office continues, his responsibility, and his bond must continue—unless you disregard the words of the Constitution, which provides for the continuance in office of the old officer, you must say that he will so continue, and remain responsible, until a successor is appointed, and qualifies, no matter how long the period may be. The security, when he becomes such, must be supposed to look to this provision of the Constitution.

But if the appointment is annual, still the bond is good for more than one year. The bond is in conformity with the act of 1742, and it was competent to the Legislature notwithstanding the nature of the appointment, to require a bond for more than one year: they referred to the act of 1823, *ch.* 195. For what period was the bond intended to be given? This is a question on the construction of the bond. 2 *Maul. and Selw.* 369. Under the act of 1823, *ch.* 195, a bond would be good for two years, because the Legislature have directed that it shall be given for two years. Under the act of 1742, its obligation covers the whole period; the Register may remain in office, because such is the clear meaning of the act, and the power of the Legislature to require, and the party to give such a bond, can hardly be doubted.

The right to recover beyond the penalty of the bond, is the question presented by this exception. The *Act of* 1825, *ch.* 208, *sec.* 1, creates this difficulty—a surety in a public bond, cannot discharge himself by paying the penalty—the object of requiring the bond, is to provide personal security. The small amount of the penalty of Constables' bonds, being greatly below the sums which ordinarily must pass through their hands, shows that the Legislature never intended to limit the responsibility of the surety to the penalty.

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Can it be contended, that in an action by a party to a constable's bond, that he or his sureties could discharge themselves by proving the payment of the penalty to a third person. The principal question on the 6th exception is, whether the *Registers* of the Chancery Court *are* required to give bond? The acts of the provincial legislature are in force, unless inconsistent with the provisions of the constitution. The 52d *section* of the constitution could not have been designed to disable the legislature from demanding a bond. The 10th *section* of the constitution authorises the putting of office bonds in suit, yet the only officer expressly required by the constitution to give bond, is the sheriff. They referred to the acts of 1800, *ch.* 82, *sec.* 2, and 1801, *ch.* 60. All the laws since the constitution requiring bonds, are invalid, if those prior to it are repealed by it.

3. Can the State recover, otherwise than as an individual, for suits in which she is interested? Act of 1742, *ch.* 10, *sec.* 7. The error on this subject is, in drawing our analogies from the powers of the king of England. The State can have no separate interest, as the king has. She is but a trustee, a mere agent, having no interest of her own, her interests, being the interests of the people. How could an injury, similar to the one now complained of, be redressed by an individual? The individual could not authorise the records to be made up; the expense of doing which could alone furnish the measure of damages. The State is interested in quieting titles, and preserving the harmony of the public. The act of 1742 provides for the disposition of the penalty of the bond. The papers in the office are not the property of the litigating parties. They are filed there for the benefit of those who claim under them, and cannot be withdrawn after being once filed. By the act of 1742, the Register was not only to keep the records in repair, but he was bound to record all the papers that were filed in his office for that purpose.

The question upon the 4th and 5th exception, is upon the admissibility of secondary evidence to prove the contents of a record. The record books were, of course, the best

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evidence, and the question is upon the sufficiency of the foundation for the introduction of secondary evidence; reasonable diligence to procure the best proof, was not employed. There was no evidence of a careful search in the office, but if there was, yet as the books were seen out of the office, a mere search in the office, would not be reasonable diligence. The meaning of the rule that the best evidence must be sought for is, that you are to look where you are likely to find the thing sought after. The place where the record is kept, is not, of course, the place in which it is likely to be found. 1 *Jackson vs. Hasbrouck*, 12 *Johns. Rep.* 194. The orders of the Chancellor could not be evidence *per se*. They are passed upon an inspection of the record. His knowledge of the fact is derived from this examination. These orders and minutes are not judicial acts, and the fact that they certify the existence of the books, shows that there is better evidence than they themselves furnish.

Were the papers from the Council Chamber, records? The resolutions of the legislature, under which these papers were recorded, only authorised the withdrawal, and the Register to deliver such papers as the law require to be recorded. A record is made by transcribing papers authorised to be recorded by law, by persons who are authorised to do so, by law. Records are not required to undergo a previous examination before they are entitled to the consideration due to them as such. The papers from the Council Chamber were not offered as conclusive, but merely *prima facie* evidence, and the defendants were bound to have shown, in order to destroy their effect, either that the papers were not correctly copied, or that they contained proceedings not proper to be recorded. In regard to the objection, that the money was not paid, until after suit was brought, they insisted, that the right to sue, is for the breach of official duty;—it is that which gives the cause of action, and the money paid, furnishes the measure of damages; and as these papers were recorded for twenty-

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five per cent. less than the law allows for such services, the defendant cannot complain of a measure so furnished.

Magruder and Brewer for Wayman—on *Wayman's* appeal.

1. The Registers in Chancery, are not legally required to give bond. 2. The *State* has no right to sue for the omission to record any case in which it is not a party, or interested in the event of the suit. 3. The minute books offered in evidence were primary, and the best evidence that could be offered to prove, that the records of the year 1816, were duly recorded by the said *Thomas H. Bowie*. 4. That the book, and parol testimony offered, ought to have been admitted, if secondary evidence only, it being sufficiently shown that recourse could not be had to the original records. 5. That the books produced are not *prima facie* evidence; that the papers and proceedings are such as the law requires to be recorded, and the amount paid by the *State*, is not the proper measure of damages. 1. Because the said books are not records. 2. Because the papers were selected by the persons appointed to transcribe the records, and who were not authorised to decide what papers ought to be recorded, and who were to be paid according to the number of sides transcribed. 3. Because the original papers have not been produced, and there is no proof that the copies have been examined and compared with the originals. 4. That the *State* is not entitled to recover in this action, the amount paid for recording said papers, because the whole was paid after the institution of this suit. 1. Officers, as a matter of course, are not required to give bond; there must be some law requiring it, and neither the constitution, or law requires it, in the case of the Register in Chancery—*Section 52* prescribes his qualifications, but it is silent in regard to a bond. Sheriffs are directed to give bond, and if it had intended that the Register should do so, a similar requisition would have been adopted in regard to that officer. No bond was ever given by a Regis-

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ter, from the adoption of the constitution, until 1811. 2. But if a bond is necessary, still the *State* can only recover for breaches in reference to cases in which she is a party, or is interested. The papers in the Chancery office are the property of the parties, until they are put on the record; until then the *State* had no interest. They referred to the acts of 1716 and 1742. The 5th section of the act of 1716 authorises the *State* to sue only when the records are not in repair, and by the same section, individuals are empowered to sue for damages sustained before the proceedings are recorded.

The 4th and 5th exceptions presents the question of the nature of the evidence, which the defendant is to produce, that the papers have been recorded. The object in offering the orders and minute book, was not to prove the contents of the record books, but to show the *existence* of such books. In controversies of a civil nature, the record books cannot be produced; their contents can only be proved by exemplified copies. The contents of a record can only be proved by the book itself, or a copy; because the contents cannot be carried in the memory, but proving the *existence* of the book, is a different affair. The proof that the proceedings in question have been recorded, is that of the very officer to whom the act of 1817, *ch.* 119, *sec.* 6, had confided the duty of prescribing those that should be recorded. To show that the evidence offered, if regarded merely as secondary, was admissible, they referred to 12 *Johns. Rep.* 194.

On the appeal of the *State*, they contended, 1. That the appointment was an annual one, but if not annual, still the bond was only good for one year. Officers here, since the adoption of the constitution, hold as they do in *England*. There is no such thing in the *State*, as an officer holding at the pleasure of the government. They all hold, either during good behavior, or their appointments are annual. The 48th section of the constitution prescribes the tenure by which offices are to be held, and the 49th

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speaks of the bonds to be given. The office of Register is not among those which are to be held during good behavior. The commission of the Register must expire on the third week in November in each year, and being an annual appointment, the sureties are only liable for one year. *Union Bank of Maryland vs. Ridgely*, 1 *Harr. and Gill*, 324, 328, 432. Bonds to the State are to be construed according to the intention of the parties, as bonds to individuals. *Lord Arlington vs. Merrick*, 3 *Saund.* 414. 2. But if the office is not annual, still the bond is good but for one year. That part of the constitution which speaks of the re-appointment, says nothing about the continuing responsibility of the old bond. It dispenses with a new commission and a second qualification, and it is to be supposed, that if they intended to dispense with a new bond, they would have so provided. Upon the question of the liability of the bond for more than the penalty, and to show that it cannot be liable for more, they referred to *Lansdale vs. Church*, 2 *Durnf. and East.* 388. *White vs. Sealy*, 1 *Doug.* 49. *Wilde vs. Clarkson*, 6 *Term Rep.* 303. 1 *Atk.* 79. *Tew vs. Earle of Winterton*, 3 *Bro. Ch. Cas.* 489. *Brangwin vs. Perrott*, 2 *Wm. Black*, 1190. 2 *Mar. Rep.* 221. *Wood vs. Wade*, 2 *Stark. Rep.* 167. 1 *Marsh. Va. Rep.* 26. *Arnold vs. U. States*, 9 *Cranch*, 109—*Act of 1742. ch.* 10.

EARLE, J. delivered the opinion of the Court.

On the trial of this cause in *Anne Arundel County Court*, both parties took exceptions, and have appealed to this Court. We will first decide on the exceptions taken by the State, and then turn our attention to those signed at the instance of the defendant.

The suit was instituted on an office copy of the bond of *Thomas H. Bowie*, late Register in Chancery, against *Henry Wayman*, one of his securities. The bond was entered into when *Thomas H. Bowie* was first appointed to the office, on the 24th day of January, 1816, and he continued to act as Register until his death, in 1821, without being

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re-appointed by the Executive, or having renewed his obligation to the *State*: and the first question that presents itself is, can the plaintiff recover in this action, for the failure of *Thomas H. Bowie* to record all proceedings from the date of the bond, to the time of his death, which it was the duty of the Register of the Court of Chancery for the time being to record?

This general question brings into immediate view the constitutional point in the cause, as well as the construction to be given to the contract contained in the obligation which is the ground of the action. The one will be disposed of by a recurrence to the constitution itself, and the other by an examination of the language of the condition of the bond, in connexion with the act of Assembly under which it was given.

All appointments to office under the constitution, by the executive of the *State*, are made by the authority of the 40th, 48th and 49th sections; and it not being pretended that the Register in Chancery is commissioned during good behavior, he is necessarily an officer of annual appointment, under the 49th section. The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed, he is not legally an incumbent of the office, and cannot lawfully perform any of its duties. This is the plain interpretation of the constitution; and in arriving at its meaning, our attention has been confined to the instrument itself, and we could not think ourselves at liberty to regard the devious course which is said heretofore to have been pursued in relation to the appointment of this officer. The constitutional grant limits the duration of the office to a certain term, and no irregularities in the proceedings of the appointing power, can extend it beyond that period. The idea so much insisted

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on, of continuing office without a re-appointment, until a new appointment is made, it is supposed has grown out of these deviations from the constitutional law, and therefore cannot receive the sanction of this Court.

The parties to the bond, executed it with an express reference to the provisions of the constitution, as thus expounded; and if its language could create a responsibility, not comprehended within them, we do not think that the expressions of this contract operate such an effect. The condition rightly and properly pursues the form the act of 1742 prescribes, and its words that seem to look to an extended responsibility, are, “whilst he shall continue in the office of Register of the Court of Chancery,” “and during the time he hath officiated in the said Register’s office;” and these, we are clearly of opinion, are to be construed to relate to the time the officer lawfully continues in his office, and not to a period when he holds it without authority. The provisions of the constitution form the basis of the contract, and like the recital in the condition of a bond, restrain the indefinite expressions used in it, and adapt them to the intention of the parties. What this intention was at the time of making the contract, cannot be mistaken. It evidently was, to engage for a faithful discharge of duties, as long as they could be legitimately performed under the official grant, and no longer.

The question we have to decide in the second exception taken by the *State* is, whether the plaintiff could recover in the action a sum larger than the penalty of the bond sued upon. This subject is not without its difficulties, and they have arisen chiefly from discordant adjudications in reference to it. We will not attempt to point out these discordancies, but proceed at once with an expression of our own opinion, formed upon reflection, and on an attentive review of all the authorities we had an opportunity to examine.

When the penalty of a bond is sued for against a surety, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages, *pro detentione debiti*,

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from the time the debt is demanded. This is the import and effect of his contract, and his accountability cannot be stretched beyond it. In this position we are fully sustained by many authorities, but by none more effectually than by 1 *Saund.* 58, note 1, and *Harris vs. Clap, et al.* 1 *Mass. Rep.* 308. This was an action against *Clap* and surety, on an arbitration bond, in the penal sum of \$5000, conditioned to pay an award of \$4618 62, which had remained so long unpaid, that the interest carried the amount greatly beyond the penalty of the bond. Under a rule of reference in the Court of Common Pleas, a judgment had been entered up on the award against *Clap*: he removed the case to the Supreme Court, on a petition of review, which had been dismissed. In the suit on the arbitration bond, *Clap* and his surety confessed the forfeiture of the obligation; and the question made was, what sum the plaintiff was entitled to recover against the defendants. The judges delivered their opinions at large, and determined that the judgments should be entered for the penalty of the bond, and interest thereon, by way of damages, for the detention of the debt from the time it was demanded by the writ; taking care that it should not exceed the sum due on the award, which was in truth and conscience the plaintiff's demand; and the chief judge declared, that in no case could the plaintiff's demand be allowed to overrun the penalty and interest thereon.

In the case under consideration, if the Court below had granted the plaintiff's prayer, sanction might have been given to a recovery opposed to this case of *Harris vs. Clapp, et al.* and as we believe, to several other authorities on this doctrine, that could easily be averted to. The plaintiff might have recovered \$4000 or £1500, notwithstanding the penalty and interest fell greatly short of that sum. The prayer, however, was refused, and we entirely approve of the opinion given by the Court, which declared, that the plaintiff was not entitled to recover more than £1000, the penalty of the bond. It is not in every case that interest by way of damages is to be recovered on the penalty: and when the

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case occurs, as it most commonly does where the obligee is plaintiff, or is asking in some form for relief, it may be considered as an exception to the general rule, which limits the recovery by the penalty of the bond. 3 *Caine's Rep.* 49. 1 *Dougl.* 49. 2 *Wm. Black.* 1190. 6 *Term Rep.* 303, (no.) *Equity Cases*, 92. 3. *Sergt. and Lowb.* 297. That the recovery in this action was properly so limited is apparent to us, when we call to mind that the question arose on a prayer to instruct the jury, who were to assess damages for breaches assigned or proved in the condition of a collateral bond, and were wholly unauthorised by the issues to find damages for the detention of the debt. Over the last they had no cognizance, and it cannot in any way be received in this case, as a subject for the instruction of the Court.

We have a word or two more for this branch of the case, before we dismiss it: We have to beg that our proposition may not be misunderstood. When we state, that the responsibility of a surety cannot be extended further than the penalty of the bond, with interest thereon, by way of damages; our meaning is, to apply it to a question of recovery in a single case, and in no manner to affect the rights of other persons, who may have just grounds to sue the same bond. If they have distinct demands, it is clear, that a recovery and payment in one suit can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty: and in particular cases, by the penalty and interest, as in *Harris vs. Clap, et al.*

Having decided on the exceptions taken by the *State*, we will now turn our thoughts, for a short time, to the four remaining exceptions, signed at the instance of the defendant. In the *third* exception the defendant's prayer is laid at the root of the action, and denies the *State's* right to maintain it. The plaintiff exhibited before the jury, sundry resolutions of the Legislature, authorizing the Governor and Council to contract, in the name of the *State*,

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with some person or persons, to record the unrecorded papers in the Chancery office: and offered the proceedings of the executive under the resolutions. And also offered in evidence the original records, made under the said resolutions and proceedings, and which had been returned to the Governor and Council, and accepted by them, and remained in the Council Chamber for the purpose of binding up, before they were deposited in the Chancery office. He also offered in evidence that the proceedings in Chancery, before the end of the third week in November, 1816, required to be recorded by *Thomas H. Bowie*, and left unrecorded by him, had been recorded under the said resolutions and proceedings, and accepted by the Governor and Council, and deposited in the Council Chamber as aforesaid; and he produced the said records in Court, and offered further in evidence, that these last mentioned records cost the *State* about \$725, which it had paid to the persons employed to make the same. The defendant on his part offered in evidence from the said records so produced, that many of the cases improperly omitted to be recorded by *Thomas H. Bowie*, were suits between individuals to which the *State* was not a party, and in which the *State* had no other interest than what belongs to it as the guardian of the rights of its individual citizens. And then prayed an instruction to the jury, that the plaintiff was not entitled to recover damages for the omission by *Thomas H. Bowie*, to record proceedings and decrees in suits, to which the *State* was not a party, and on account of which nothing was paid to *Bowie* by the *State*, or by him demanded of it. Our reflections on this point, have satisfied us, that the Court were right in refusing this direction to the jury. To say nothing at present of the acts of 1716, *ch.* 1, and 1742, *ch.* 10, which in terms give the action to the public, it appears to us, it may be sustained by the *State* on one ground without the aid of others. The records of our Courts of Justice are to be considered as public property, and so important is it to the community that they should be made up correctly and

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preserved with care, that when a neglect in these particulars in any of its officers occurs, an obligation is imposed on the *State* to supply the defect, and have the work done at the expense of the Treasury. The defaults of the officers are thus visited on the public, and their bonds afford the only means of security for the *State* to resort to against loss.

The *fourth* and *fifth* exceptions present questions of evidence, and are of minor consideration, and will be disposed of at the same time. The defendant wished to give in evidence two record books, in which were recorded proceedings required to be recorded by *Thomas H. Bowie*. He proved by the present Register, that two such books were in the Chancery office, and being unable to produce them, he endeavored, by testimony, to show they were lost, in order to let in the secondary proof of them, which he offered to lay before the jury. The point then is, whether his testimony was sufficient to answer the purpose he had in view. Whether the evidence of the loss of the books, was such as to authorise the admission of the proof offered. The Court below thought it was not, and we cannot but coincide in the opinion. The utmost extent to which the testimony went, was to prove that the books inquired after had been missed from the Chancery office, and that there was every reason to believe they had been taken out by, and were in the hands of, some of the persons engaged in recording the Chancery proceedings, under the resolutions of the Legislature: and that *Joseph Mayo*, the only one of the recording Clerks applied to for these record books, stated he did not recollect having taken them out, and did not know that he had ever seen them out of the office; and while the trial was going on, that he made an unsuccessful search for them among the books and dockets in the committee room of the House of Delegates, which had been used by the Clerks when employed in recording the Chancery papers. This testimony is inconclusive and unsatisfactory, and leaves the mind in doubt, whether by a further

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search the record books sought for, might not have been regained. Several persons were employed in making up these records, and for some purpose, it is believed, had these books, and yet one of them alone was applied to for them, and the application to him was made at so late a period, that a confused and hurried examination for them could only be made. This is not the reasonable diligence the law requires in hunting up lost records, and is insufficient to let in, to the jury, the parol proof mentioned in the *fifth* exception, or the inferior evidence offered by the defendant in the *fourth* exception. The primary character claimed on the argument, for the reports and orders in the time of Chancellor *Kilty*, made under the act of 1817, *ch.* 119, and offered in the *fourth* exception, cannot be acceded to them. If they are evidence at all, a point upon which it is unnecessary to make up an opinion, they must range in the subordinate class, and cannot be received to supply the place of a record, until conviction is produced on the minds of the Court of the loss of it. The principal objection made by the defendant in the last exception, to the instruction prayed by the plaintiff was, that the bond sued on was not required by the constitution or any then existing law, and therefore he was not legally responsible under the said bond, for the conduct of *Bowie*, as Register of the Court of Chancery, for any period of time. This is a question of some magnitude, and we must return again to the constitution for the solution of it. The sheriff is the only officer who is required, in express terms, by the constitution to give bond and security, and this, by the 42d *section*, he is bound to do, every year, "*as usual.*" The form then in use was prescribed by the act of 1715, *ch.* 46, and it was constantly after used by the sheriff elected by the people, until the year 1794, when it was found expedient to increase the penalty and alter some parts of the condition. It was competent to the Legislature to prescribe a new form of bond for the sheriff, immediately after 1776; but at that juncture, there was other business to occupy that body, and they

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were willing to repose upon the then laws of *Maryland*, which unquestionably formed the ground work of the constitution itself. How else are we to understand the before mentioned expression of the 42d *section*, *as usual*, which has a direct reference to the existing laws, or the practice under them. The County Clerks, by the constitution, are to hold their commissions during good behavior, and although they are not expressly directed to give bond and surety, as in the case of the sheriff, from the year 1776 to the year 1800, bonds were given by them, and that according to the form prescribed by the act of 1742, *chap. 2*. In the last mentioned year, the year 1800, a law was passed compelling the Clerks of the County Courts to give bonds in larger penalties, and with a different form of condition. The same may be said of the other officers named in the act of 1742, and in the constitution of the *State*; all of whom, at one period or other, within the last fifty years, have complied with the act, and given bond, pursuant to its provisions, without any respect whatever to the tenure of their offices, which, under the *Provincial* government, it is believed, was only *durante bene placito*. *Bordley vs. Lloyd*, 1 *Harr. and M'Hen.* 27. All this uniformity of proceeding, from the earliest times, goes forcibly to prove, that the acts of 1716, *ch. 1*, and 1742, *ch. 2*, were existing laws at the adoption of the constitution, and were so considered by those who were first engaged in carrying it into execution. If this wants further confirmation, we think it may be found in the 10th *section* of the constitution itself, which seems to point to those laws, and to imply strongly, that other officers than the sheriff were to give bond with security. The section gives to the House of Delegates power to direct all office bonds, which are to be made payable to the *State*, to be sued for any *breach of duty*. We clearly think, then, that the defendant was responsible under the bond, for the conduct of *Bowie*, as Register of the Court of Chancery, the first year he was in office. Other objections were started by the defendant to the plaintiff's prayer in the last

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exception, all of which we consider groundless, and as forming no legal impediment to the instruction given by the Court to the jury. We do not deem it necessary to give them a particular notice.

JUDGMENT AFFIRMED.

MORRIS vs. CHAPMAN's Administrator.—*June, 1830.*

Upon a bill being filed to recover the value of certain negroes, which M held in trust for the complainant, and which had been sold through the intervention of an agent who considered himself entitled to the proceeds, it was agreed between M and the agent, that if M would delay settlement and permit the agent to retain the money, and defend the bill, he would indemnify him from all loss. A final decree having passed against M, in an action brought upon his contract of indemnity, HELD, it was competent for the defendant to give in evidence, that he had apprised the plaintiff in due time of the nature of the defence, which he desired should be made to the suit, and of the sources by which he meant to establish it, so as to enable the plaintiff, by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired; and also to show that the plaintiff had failed to comply with his contract, by refusing to permit him to defend the bill.

If the defendant supplied the plaintiff with a proper answer, supported by such proofs as would furnish the latter with a reasonable ground to believe the facts stated in the answer to be true, he was bound by the spirit of his contract to have accepted and filed it, or put in answer containing in substance the same defence.

Whether such answer was furnished, and such proofs given as would lay a reasonable ground for the plaintiff's believing the defence set up by the defendant, was a question of fact for the jury, to be determined by an exhibition of the answer and proofs in support of it, as communicated to the plaintiff.

If the plaintiff in his conscience could not put in the answer furnished him by the defendant, good faith on his part demanded that he should have pointed out his objections and difficulties to the defendant.

APPEAL from *Charles County Court.*

Assumpsit by the appellant, *William Morris*, against the appellee, *John G. Chapman*, as administrator of *Samuel*

Chapman, brought on the 7th of March, 1825. The first count in the declaration stated, that the said *Samuel*, in his life-time, to wit, on the 18th September, 1818, acting for, and in behalf of the said *William*, who then and there had and held certain negro slaves, in trust for the use and benefit of a certain *Sarah Maddox*; he the said *Samuel*, at the request of the said *William*, sold and delivered to divers persons, the said negro slaves, and received therefor, the sum of \$1457, to wit, on, &c. at, &c. which said sum of money the said *William* hath since paid, and satisfied to the said *Sarah Maddox* by, and under a decree of Charles County Court in Chancery sitting, of which said matters and things, the said *Samuel* in his life-time had notice, &c. There were also counts for money had and received, for money paid, laid out, and expended, and for matters, and articles properly chargeable in account. The defendant pleaded *non assumpsit*, to which issue was joined.

1. At the trial the plaintiff gave in evidence to the jury, the written authority from the plaintiff to the defendant's intestate to sell certain negroes, which negroes the plaintiff held in trust for *Sarah Maddox*, (formerly *Sarah Ware*) the complainant in a bill in Chancery hereinafter referred to, and also a written authority from said intestate to a certain *Robert Finch*, to sell part of the negroes, and his, the intestate's receipt, for the amount of said sales \$1100, to wit, "Charles County, February 17th, 1818. I do hereby authorise *Samuel Chapman*, to sell and dispose of certain negroes (described by name) with their increase, as witness my hand and seal, the day and date above written. *William Morris*, (seal.)" "I do hereby authorise *Robert Finch* to sell *Louisa*, *Francis* and *Washington* (being the children of one of the female slaves mentioned in the authority from *Morris* to him) as witness my hand and seal this 17th day of April, 1818. *Samuel Chapman*, (seal.)" He then proved by a competent witness that the balance of said negroes was sold for \$450, and that the net proceeds (deducting expenses,) amounting to \$1457, were received by said *Chapman*. He

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also read in evidence to the jury, the bill and exhibits filed by *Sarah Maddox*, against him the plaintiff, his answer, and supplemental answer thereto, the bill of interpleader filed by the defendant's intestate, and the decree of the Court, on the bill of the said *Sarah Maddox*, passed on the 9th of June, 1824, by which he was ordered and directed to pay her the sum of \$654 20, with interest from the 31st January, 1818. He further proved, that after the passing of said decree, and a *fi. fa.* thereupon issued, had been levied on his property, he gave notice to the said intestate, that he was about to pay the money over to *Mrs. Maddox*, and if he wished to take any measures to arrest the same, now was the time. He then proved the payment of the money so decreed against him, in favor of *Sarah Maddox*. He further proved that some time after the filing of said bill of complaint by *Sarah Maddox*, and a little time before his, the plaintiff's answer thereto, was filed, (but the witness could not state the precise time,) the plaintiff, and the defendant's intestate went to the house of the witness, and said *Chapman* told the witness they had come to him to witness their contract. He, *Chapman*, then stated that *Mrs. Maddox* had filed a bill against *Morris* to recover the money, for which certain negroes had sold, and that *Morris* wished to settle the matter with *Mrs. Maddox*, and had called on him for the proceeds of the sale of said negroes to enable him to do so. *Chapman* also stated that he had agreed with *Morris*, that if he *Morris* would delay settling with *Mrs. Maddox*, and let the case go to final hearing, and permit him to retain the money, and defend the suit, that he, *Chapman*, would indemnify him, *Morris*, against all loss, that is, would repay to him every thing that should be recovered in that suit, together with all his expenses incurred in defending the same, both private and legal. The witness had been employed by *Morris*, as his solicitor in the case of *Sarah Maddox* against him. The witness then asked said *Chapman* what he wished done for him in that case, when *Chapman* replied that he did not employ wit-

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ness as his solicitor, but should employ his own counsel to manage the cause. In answer to a question from the defendant's counsel, the witness stated, that he deduced from every thing that *Chapman* said, that he claimed an interest in the money for the recovery of which the bill was filed by *Sarah Maddox*. The plaintiff further proved, that the *subpœna* was returnable to August term, 1824, which was issued to compel the plaintiff to answer the bill of interpleader, filed by said *Chapman*, and that an attachment subsequently issued against him for the same purpose. The defendant then read in evidence to the jury, copies of the two following letters written by his intestate to the plaintiff, having previously proved the service of a notice on the plaintiff to produce the originals.

“Dear sir, I was not until last night informed of the contents of *Mrs. Maddox* bill, or your answer; at both I am equally surprised: first, that she should have sworn that she received no consideration for the negroes sold, and that you should have sanctioned it by admitting in your answer, that there would be a considerable amount due her, which you are ready and willing to pay her; when she and you both know, that when it was first determined that the negroes should be sold, it was with an express understanding that I was to purchase with the money arising from the sale, goods, &c. for the family to a considerable amount, and you both know I have done so; all which I can prove by indifferent, and incontestable testimony. Sir, this business comes in a questionable shape, and has at best a suspicious aspect, and if the business is not immediately settled, between *Mrs. Maddox* and yourself, character must be implicated, and the whole affair probed to the bottom, as I am determined mine shall not suffer. *Samuel Chapman*. May 4th, 1823.”

“Dear sir, I again solicit your attention to this business of *Mrs. Maddox's*—you will perhaps say it is none of my business; such may be, and I believe it is the fact, but to prevent any misunderstanding between you and myself, in

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the settlement of our accounts, (which I wish to take place immediately,) I have thought it well to inform you, that on seeing your property advertised, I intended to get a writ of injunction to stay the proceedings, and leave the money in your hands for my use; but on consulting counsel, was advised to have no more to do in the business; that having put in a bill of interpleader which had not been answered, either by *Mrs. Maddox* or yourself; that until that was done, under all the circumstances nothing can or ought to be claimed of me, either in law or equity. I was also informed, on enquiry as to the amount of the judgment, it was for about \$90 or \$95 more than it ought to have been, upon which ground you may obtain an injunction, and you can then by putting in your bill praying a reviewal, have the matter fully and fairly investigated, by which investigation you can prove that every cent of the money has been paid over, and that *Mrs. Maddox* has frequently and often said, that I did not owe one cent, but that she had received the whole. I have thought proper to give you again this information, least you might expect to get something out of me, and under this idea might be disappointed. You now have it completely in your power to defeat *Mrs. Maddox's* claim against you, and if you do not do so, recollect that it is not my fault. June 29th, 1824."

To the reading of these copies the plaintiff objected.

The defendant then offered to read in evidence, the draft of an answer which this intestate had prepared and sent to the plaintiff, for him to swear to and file, as his answer to the before mentioned bill by *Sarah Maddox*, and proved that the purport of the same was communicated to the plaintiff, by the person by whom it was sent. That said plaintiff refused to receive the said paper, and the witness who carried it back to said intestate told him he was not certain what answer the said plaintiff made when he offered him the said paper. Accompanying the said paper, there were two affidavits, one of which was sworn to on the 4th of June, 1823, going to establish the facts contained therein.

The plaintiff objected to the reading of these papers, but the Court allowed them to be read, and the plaintiff excepted.

The defendant then prayed the Court to instruct the jury, that if they should be of opinion from the evidence in the cause, that the defendant's intestate had by his contract assumed upon himself the defence of the case in Chancery by *Sarah Maddox* against *William Morris*, (the plaintiff,) so far as his *Chapman's* interest was involved therein, then that the defendant's intestate was absolved from his contract with *Morris* to repay to him whatever said *Sarah Maddox* might recover from him in said Chancery suit, and expenses, if said *Morris* refused to put in said answer, unless they should also find, that he pointed out his objections to said answer, at the time it was offered to him to be filed; which opinion and instruction the Court gave. The plaintiff excepted, and the verdict and judgment being for less than he claimed, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., MARTIN and ARCHER, J.

Stonestreet for the appellant.

1. The Court below erred in permitting to be read to the jury the copies of the two letters from *Chapman*, the intestate of the appellee, to the appellant. 1 *Phil. Ev.* 389.

2. That the answer, prepared and tendered by the appellant's intestate to *Morris* the appellee, and the accompanying affidavits, were inadmissible as evidence.

C. Dorsey, for the appellee, cited *Stark. Ev.* 17. *Douglass*, 635. 1 *Term. Rep.* 638. 7 *Ib.* 125. *Chitty on Plea.* 279, 339.

ARCHER, J., delivered the opinion of the Court.

It appears from the evidence in this cause, that *Sarah Ware* being about to intermarry with *John Maddox*, conveyed by bill of sale, dated the 28th December, 1807, sun-

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dry negroes to the plaintiff, in secret trust for her use. That afterwards it was agreed that the plaintiff should sell the negroes, and that the proceeds should be held by the plaintiff for her benefit. On the 17th February, 1818, the plaintiff authorised the defendant to sell the negroes. That they were accordingly sold for the net sum of \$1457. *Sarah Ware*, after her intermarriage with *John Maddox*, and after his death, instituted a suit in the County Court as a Court of Chancery, (at what time does not appear) against the plaintiff, alleging the trust and sale by the plaintiff, and praying that he might be compelled to account. Shortly afterwards, and before any answer had been put in by the plaintiff, the defendant, who had received the proceeds of the sale of the negroes, as agent of the plaintiff, entered into a contract with the plaintiff, by which he stipulated, that if the plaintiff would delay to settle with *Mrs. Maddox*, and let the case go on to final decree, and permit him to retain the money and defend the suit, that he would indemnify the plaintiff against all loss, that is, would repay to him every thing which should be recovered in that suit, together with all his expenses in defending the same, both private and legal. This agreement on the part of *Chapman*, appears to have been made, on account of an interest he supposed he had, in the monies claimed by *Mrs. Maddox* against the plaintiff. At the time of this agreement, the solicitor of the plaintiff desired to know of the defendant what he wished to have done for him, in that case, who declined to furnish the information, but stated that he would employ his own solicitor. Shortly after this agreement, about the month of August, 1821, (as may be collected from the affidavit attached to the answer) the plaintiff filed his answer to the bill of *Mrs. Maddox*, whereby he claimed sundry payments and disbursements from the funds, arising from the sale of the negroes, which had been made at the solicitation of the claimant, amounting to the sum of \$892 80, and professed a willingness to pay to the complainant the balance of the proceeds of sale. Between the months of

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May and August, 1823, the defendant transmitted to the plaintiff the draft of an answer to the bill of *Mrs. Maddox*, containing a reiteration of the answer which the plaintiff had already put in, and in addition thereto, a statement, that he had advanced very considerable sums of money, at the request, and with the concurrence of the complainant, to an amount beyond the proceeds of sale; and accompanied the said answer, with the affidavits of two witnesses, verifying some of the facts stated in the answer thus furnished, as connected with advances by the defendant. This answer the plaintiff *not only refused to accept, but to examine*. In the month of November, 1823, *Morris*, the plaintiff, filed a supplemental answer to the bill of *Mrs. Maddox*, in which he set out *in part* only the defence of the defendant, as set out in his answer which he had furnished. And the Chancery suit was set down for hearing at June term, 1824, when a decree passed against *Morris*, for the sum of \$654 20. It was further proved, that the plaintiff gave the defendant notice of the decree against him, and that he was about to pay the same, and that if he wished to take any measure to arrest the payment, that was the proper time. The defendant in addition, offered in evidence copies of two letters, the one dated the 4th of May, 1823, and the other dated the 29th of June, 1824, twenty days after the decree, first having offered evidence of a notice to produce them. The admission of these letters in evidence, constitutes the first objection to the opinion of the County Court. It would have undoubtedly have been competent for *Chapman*, to have given evidence that he had apprised the plaintiff of the nature and character of the defence, which he desired should be made to the suit, and to have informed him of the sources by which he meant to establish such defences, so as to enable the plaintiff by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired. A letter giving such information would have been admissible. But the letter of the 4th of May, 1823, is not of this character. It is a letter only ap-

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pealing to the plaintiff's knowledge, that he had expended at the request of *Mrs. Maddox* a considerable sum, and abusing him for the answer he had filed. It is true, he says, that he can establish the facts, which he alleges are within the plaintiff's knowledge, but he does not point to the persons who would prove them. This letter was therefore not calculated to enable the plaintiff to comply on his part with the agreement. It gave him no further information, as it admits, than what he had. The second letter we think is still more objectionable. It was written after the decree, when the contract between the parties was either fulfilled or violated. After such a period nothing which either party might say in relation to the matter, could be evidence for himself. The Court below permitted the defendant to read in evidence the answer furnished by the defendant to the plaintiff, to be filed as the plaintiff's answer to the bill; and also permitted, as appears by the last bill of exceptions in the record, two depositions to be read to the jury which had accompanied the answer—in this we think the Court were right. It was competent for the defendant to show that the plaintiff had failed to comply with his contract, in refusing to permit him to defend the suit, and if he had supplied him with a proper answer, supported by such proofs, as would furnish the plaintiff with a reasonable ground to believe the facts stated in the answer to be true, he was bound by the spirit of his contract to have accepted and filed it, or to have put in an answer, containing in substance the same defence. And whether such answer was furnished and such proofs given, as would lay such a reasonable ground, was a question of fact for the jury, and could only be proved by exhibiting to the jury the answer itself and the proofs offered. They were not offered with any other view, nor could they be. They were no evidence to the jury of the truth of any fact therein stated, but only evidence to shew that *Chapman* had offered to defend, and his defence was such, as ought to have been accepted, or filed in the cause by the plaintiff. The direction of the

Court in relation to the contract, turns altogether on the plaintiff's obligation to point out objections to the answer furnished, if he did not think proper to accept it. We however have taken a different view of the duties of the parties under this contract. *Chapman* was to be allowed to defend the suit, but it could only be done through the intervention of the plaintiff. If *Chapman* had furnished an answer, supported by such proofs as would give the plaintiff reasonable grounds for believing the truth of the facts he stated, the plaintiff was bound to have accepted it, or to have filed an answer, containing in substance the defence it set up, and could not discharge himself from such obligation by stating objections to it. The compliance of *Chapman* with his contract was solely to be determined, by the character of the defence made and offered. If that was of the description above mentioned, and it had been rejected, the defendant would have been absolved from his contract, unless the plaintiff had himself filed an answer, containing the substantial defences set up in the rejected answer. Although the answer furnished had not been accepted, still *Chapman* would have been bound if the plaintiff had put in an answer containing in substance the defence of the defendant. If this proposition be true, and we think it cannot be denied, it conclusively shows that the opinion of the Court below in this respect was erroneous, for then he might have rejected the answer, have assigned no reasons, yet by putting in an answer in his own way, but containing the substance of the rejected answer, might still have held the defendant to his contract. The directions of the Court appears to be bottomed on the hypothesis, that the answer was such, as the plaintiff could not put in; and if the prayer had been so framed, we should not have objected to the directions given, in the form in which they were, to the jury. For if the defendant, endeavoring to comply with his contract, had furnished an answer which the plaintiff in his conscience could not put in, good faith on his part would seem to have demanded, that he should have

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pointed out his objections and difficulties to the defendant, that he might have been enabled so to shape his defence, that the plaintiff could conscientiously have made it. It has been stated that it would have been competent for the plaintiff after having rejected the answer, to have held the defendant to his responsibilities under the contract, provided he had filed an answer himself, covering in substance, the defence which the defendant desired should be made, and it has been urged in the argument that this has been done. But a reference to the supplemental answer will show, that it did not cover the defence which the defendant had set up.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

KEPLINGER vs. GRIFFITH,—*June, 1830.*

Where the agent of an endorsee, the holder of a promissory note, called upon the maker for the payment of the note, and the maker offered to pay the same in goods, which the agent declined receiving, having authority only to accept money, it is unnecessary in an action upon the note to prove either the hand writing of the maker or previous endorser; as the offer to pay the agent, amounted to an admission that every thing had been done necessary to the endorser's right to receive the money; that there was no objection to his paying the note, and superseded the necessity of further proof.

In an action by the endorsee against the maker of a promissory note, negotiated before maturity, evidence that a few days before the institution of the suit, the witness spoke to the defendant on the subject of the note, when the defendant said he could not pay it, that the payee of the note had charged him too much, that some discount must be taken from the note, and that he must see the payee on the subject; that, however, he would think of it, and if witness would call at his store in a few days, he would say more about it; that shortly after witness did call, when defendant said he was going to P, when he would see the payee, until then he could do nothing further, is a sufficient answer to the plea of limitations.

APPEAL from *Baltimore County Court.*

Assumpsit, by the holder, the second endorsee, against the maker of a promissory note, dated March the 10th,

1819, payable four months after date, for \$188 87. The writ issued on the 31st of July, 1824. The declaration contained a count on the note, and for money had and received. The defendant pleaded—1st, *non assumpsit*. 2d, *non assumpsit infra tres annos*—and 3d, *actio non*, &c. to which issues were taken.

At the trial the plaintiff offered in evidence the following promissory note, with the several endorsements thereon. “\$188 87½. Baltimore, March 10th, 1819. Four months after date, I promise to pay to *John Kiems*, or order, the sum of one hundred and eighty-eight dollars and eighty-seven cents, for value received. *Samuel Keplinger*.” (Endorsed) “Pay the contents to *C. E. Chevalier*, or order, *John Kiems*.” “Pay the contents to *Caleb Griffith*, or order, *C. E. Chevalier*.”

And further offered evidence that said note was forwarded to witness by the plaintiff, before it was at maturity, by whom it was placed in bank for collection. Said note, however, not being paid, witness afterwards called several times on defendant for payment, and was offered payment in goods, particularly steel watch chains, but witness having no authority to accept any thing in payment but money, declined taking them; the aforesaid transactions took place *before* the year 1821. Subsequently to this period, that is to say, a few days preceding the institution of this suit, the witness met the defendant in one of the streets of the city of *Baltimore*, and addressed him on the subject of the aforesaid note, when the defendant said he could not pay the said note; that *Mr. Chevalier* had charged him too much, and that some discount must be taken from the note, and that he must see *Mr. Chevalier* on the subject. Defendant, however, said he would think of it, and if witness would call at defendant's store in a few days, he would say more about it; that shortly afterwards witness did call, when defendant said he was going to *Philadelphia* in a few days, when he would see *Mr. Chevalier*; until then he could do nothing further. Upon the foregoing pleadings

and testimony, the defendant moved the Court for their opinion and direction to the jury, that the plaintiff was not entitled to recover—Because, *First*. The making of the note in question by the defendant, and the several endorsements thereon, have not been duly proved on the part of the plaintiff, nor any evidence thereof given. *Second*. A new promise within three years before the commencement of this suit to pay the said note by the defendant, so as to remove the bar of limitations insisted on in his second and third pleas, has not been proved, nor any evidence thereof given. *Third*. No evidence has been given on the part of the plaintiff, that he did take, or offered to take any discount from the said note, or otherwise perform the condition on which the supposed new promise was made. Which opinion and direction the Court (HANSON, A. J.) refused to give, but were of opinion and so directed the jury, that if the jury believed the witness, the plaintiff was entitled to recover. The defendant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and DORSEY, J.

Williams (District Atty. U. S.) for the appellant, contended, 1. That it was necessary to prove the hand writing of the several endorsers, as the endorsements were set out in the declaration. He insisted that there was no evidence of the hand writing of *Chevalier*, and none that defendant had ever seen the note since he signed it. Although it might be admitted, that the declarations of the defendant, amount to an admission that the note was in the possession of *Chevalier*, there was no proof that he knew it to be in the hands of the plaintiff. When defendant promised to pay the note, he supposed that *Chevalier* was the holder, and therefore he cannot be understood, as admitting his endorsement. His promise can only conclude him, as to those facts, of which he had knowledge, and no further.

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On this point he cited 1 *Camb. Rep.* 100. *Peak. Evid.* 220. *Sidford vs. Chambers*, 2 *Serg. and Low.* 410. *Smith vs. Chester*, 1 *Term. Rep.* 654.

On the 2d and 3d points, he referred to *Oliver vs. Gray*, 1 *Harr. and Gill*, 214, 216, 218, 219. *Wetzell vs. Bus-sard*, 11 *Wheat.* 309, 310. *Bell vs. Morrison*, 1 *Peters' Rep.* 351. *Roosevelt vs. Mark*, 6 *Johns. Ch. Rep.* 290. *Sands vs. Gelson*, 15 *Johns. Rep.* 511. *Shuby vs. Cham-plin*, 4 *Johns. Rep.* 469. (note B.) *Harrison's Index*, 67. *A' Court vs. Cross*, 3 *Bingham*, 329. 2 *Barn. and Ald.* 759. 4 *Maul. and Selw.* 157. *Short vs. M'Carthy*, 3 *Barn. and Ald.* 626. *Hellings vs. Shaw*, 7 *Tawnt.* 608. 2 *Harr. Index*, 925. 4 *Bingham*, 105. *Ib.* 303. 6 *Barn. and Cres.* 603.

Johnson, for the appellee.

1. The conversation which first took place between the witness, and the defendant, was certainly evidence for the jury, and if true, entitled the plaintiff to a verdict. A promise to pay a note after it is due, amounts to proof of every thing, which otherwise the party would be bound to prove. *Jones vs. Morgan*, 2 *Camp. Rep.* 474. *Sidford vs. Chambers*, 2 *Serg. and Low.* 410. *Chitty on Bills*, 410. (*Ed.* 1819.) *Lundie vs. Robertson*, 7 *East.* 231. 1 *Wheat. Selw.* 279. *Saund. Plea. and Ev.* 337. On the question of limitations, he referred to *Oliver vs. Gray*, 1 *Harr. and Gill*, 204.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This suit was brought on a promissory note, given by the appellant to *John Kiems*, who endorsed it to *C. E. Cheva-lier*, by whom it was endorsed to the appellee, in a regular course of negotiation, before it was at maturity. The pleas of *non assumpsit*, *non assumpsit infra tres annos*, and *actio non*, &c. were put in, on which issues were taken. The Judge here, after referring to the evidence contained in the bill of exceptions, stated, that upon the pleadings and testi-

mony, the appellant moved the opinion and direction of the Court to the jury, that the appellee was not entitled to recover, on three grounds. *First*, that the making of the note by him, and the several endorsements thereon, had not been proved, nor any evidence thereof given. *Second*, that a new promise by the appellant, within three years before the commencement of the suit to pay the note, so as to remove the bar of limitations insisted on, in his second and third pleas, had not been proved, nor any evidence thereof given. *Third*, that no evidence had been given on the part of the appellee, that he took, or offered to take any discount from the note, or otherwise perform the condition, on which the supposed new promise was made. Neither of these objections to the right of the appellee to recover was sustained; but the Court before which the cause was tried, was of opinion, and so instructed the jury, that the appellee was entitled to recover, if they believed the witness; in which we concur with that Court. As to the first point, the suit was against the appellant as the maker of the note, the execution of which, was a matter within his own knowledge; and surely his offer to pay it, when called upon after it became due, was sufficient evidence of *his* signature, a sufficient admission that *he* was the maker of it. The several endorsements by which it came to the hands of the appellee, being set out in the declaration, it became necessary at the trial to prove them; and as it is not to be supposed that the appellant would have paid it to any one, whom he did not know to be entitled to receive it, his offer to pay it to the agent of the appellee, was a sufficient admission of the endorsements, and of the appellee's right to receive it. It amounted to an admission, that every thing had been done, necessary to the appellee's right to receive it, and that there was no objection to his paying the note, and superseded the necessity for further proof. *Sidford and another vs. Chambers*, 2 Serg. and Lowb. 410. In *Jones vs. Morgan*, 2 Camb. Rep. 474, which was an action against the drawer of a bill of exchange, dishonored

for non-payment after being accepted, it was decided that though it was unnecessary to have stated the acceptance in the declaration, yet as it was stated it must be proved; but that a promise to pay after the bill became due, was a sufficient admission, as well of the acceptance, as of the hand writing of the defendant. The same principle will be found in *Lundie vs. Robertson*, 7 *East*. 231.

As to the *second* point, in *Oliver vs. Gray*, 1 *Harr. and Gill*, 204, it was ruled by this Court, that an acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse, for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient to take a case out of the statute of limitations. Now this is just that case. The offer to pay the note, was not proved to have been made within three years before the bringing the suit; but the making of it by the appellant, and the several endorsements upon it, being established, his saying when spoken to on the subject, only a few days before the suit was instituted, “that he could not pay it, that *Chevalier* had charged him too much, and some discount must be taken from it; and that he must see *Mr. Chevalier* on the subject,” was a clearly implied admission, that the debt remained due and unpaid, and the excuse alleged for not paying it, furnished no real objection to the payment of it, if true. The note came to the hands of the appellee, by endorsement in a regular course of negotiation, and if the suit had been brought within three years, it would have been no defence to the action, that *Chevalier* had charged the appellant too much, for it would seem to have been given on account of some transaction with *Chevalier*; and the admitted continuing existence of the debt, carried with it the assumption raised by the law. And as to the *third* point, that the appellee had offered no evidence, that he took, or offered to take any discount from the note, it is answered by saying, that he was under no obligation to make any discount. The appellant was entitled to no dis-

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count as against him ; nor against any body else, as far as appears, for there is no evidence in the record on the subject. And even if he could have been entitled to a deduction from the amount of the note, in a suit between him and *Chevalier*, there is no pretence for saying that the note was subject to the same deduction in the hands of the appellee.

JUDGMENT AFFIRMED.

DAVIS vs. LEAB.—*June, 1830.*

This Court, since the Act of 1825, ch. 117, so far as regards the common law cases, is strictly an appellate Court, deciding every cause upon the question submitted below, and upon none other.

So where after the evidence had been all offered in the County Court, the defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, and the Court gave the instruction, but the record did not show the point upon which that Court acted, this Court can neither reverse nor affirm—in such case the appeal must be dismissed.

L upon an award in his favor, wrote the following order: “M will please pay D, or order, the above award of \$289, with interest, which sum I guarantee to said D for value received, this 10th September, 1822. L.” In October, 1822, D presented the order to M, which was not paid. In August, 1824, he obtained judgment upon the award against M, who at that time was and ever since has been insolvent. In November, 1823, D informed L of M’s failure, and required payment of L, which was refused. In June, 1824, D sued L. HELD, that he could not recover.

PER FREDERICK COUNTY COURT.

APPEAL from *Frederick County Court.*

This was an action of *Assumpsit* commenced on the 28th of June, 1824, by the appellant, *Ignatius Davis*, against the appellee, *Jacob Leab*, on a guarantee. The defendant pleaded *non assumpsit*.

1. At the trial the plaintiff offered in evidence the following award, and the order and guarantee thereunder written. “We, the subscribers, arbitrators appointed by

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Jacob Leab and *Ezra Mantz*, in the settlement of accounts, of *Jacob Leab* against *Francis Ritchie*, from the commencement to the last date of the account: do award that *Ezra Mantz* pay unto *Jacob Leab*, or order, thirty days from the date hereof, \$289 current money, being the balance we have allowed due *Jacob Leab*, on the accounts of *Francis Ritchie*: witness our hands, this 30th of May, 1820. *Isaac Mantz*, *Ns. Turbatt*.” “Mr. *Ezra Mantz* will please to pay *Ignatius Davis*, or order, the above award of \$289 with interest. Which sum I guaranteed to said *Davis*, for value received, this 10th of September, 1822. *Jacob Leab*.” Having first proved that *Jacob Leab* the defendant, signed and delivered the same to the plaintiff, at the time it bears date. The plaintiff further proved, that after the delivery to him of said award and order, he called on *Ezra Mantz*, the person therein named, for payment of said award, some time in the month of October, 1822, who promised to do so, as soon as he could get money enough for that purpose. That the said *Ezra Mantz* failing to pay the amount of said award and order to the plaintiff, he instituted suit against him in *Frederick County Court*, to October term, 1823, upon which he obtained judgment at August term, 1824, for the amount thereof. He further proved, that at the time said judgment was obtained, and ever since, the said *Mantz* was, and still is insolvent. That on the first day of November, 1823, the plaintiff called on the defendant and informed him of the failure of said *Mantz* to pay to him, the said award and order, and demanded payment thereof from the defendant, who refused to pay the same, and thereupon this suit was instituted. The defendant then prayed the Court to instruct the jury, that upon the evidence offered by the plaintiff, he is not entitled to recover. Which instruction the Court, (*SHRIVER*, and *TH. BUCHANAN*, A. J's.) gave. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

F. A. Schley, for the appellant.

The only question in this case is, whether the guarantee of the appellee is to be treated, as would be treated the contract of an endorser of a bill of exchange. It was never contemplated by the parties to this contract, to change the relation which subsisted between them. *Leab* is still to be viewed as the debtor of *Davis*. The contract of the former does not rest upon the mere implication of law—it is express, and the Court can do nothing but enforce it. *Cutter vs. Powell*, 6 Term. Rep. 320. *Cates vs. Night*, 3 Term. Rep. 444. The responsibility of an endorser simply, is regulated by law; which to fix his liability, requires certain things to be done, and in the absence of any express contract, reference is supposed to be had to the implied one; but the party here has expressed his engagement, and the Court cannot introduce stipulations, and impose duties, which are not to be found in the contract itself, as written. *Leab's* obligation was unqualified, that the money should be paid, and nothing but payment can be a compliance. He is to be regarded, either as a principal, or security—if as a principal the case is at an end—if as a surety, then forbearance of the principal will not discharge him, he being considered a guarantor, and bound to see the money paid. *Wright vs. Simpson*, 6 Ves. 734. *Bank of New-York vs. Livingston*, 2 Johns. Cases, 409. *Nelson vs. Dubois*, 13 Johns. Rep. 175. *Murray vs. King*, 7 Serg. and Low. 57. (5 Barns. and Ald. 165.) There is a guarantee in every endorsement, but it is a commercial guarantee, and is governed by commercial rules—it is by implication of law, and has no analogy to an express and positive engagement. *Campbell vs. Butler*, 14 Johns. Rep. 349. *Tillman vs. Wheeler*, 17 Johns. Rep. 326. *Allen vs. Rightmere*, 20 Johns. Rep. 365. *Cumpston vs. M'Nair*, 1 Wend. 457. *King vs. Baldwin*, 2 Johns. Ch. Rep. 559.

Bigelow's Dig. 638. *Upham vs. Prince*, 12 *Massa. Rep.* 15.

Palmer, for the appellee, contended, 1. That the contract on which the suit was brought, was to be viewed as an accepted bill of exchange, payable on demand. To constitute a bill of exchange no form of words is necessary; it is sufficient, if there be a direction to the drawee to pay the money to the payee. *Chitty on Bills*, 53. 2. No time of payment being expressed, it was payable on demand. *Chitty on Bills*, 345. *Gracie vs. N. Y. Ins. Co.* 8 *Johns. Rep.* 189. *Jackson vs. Ketchum*, *ib.* 374. 3. Being payable on demand, it should have been presented in a reasonable time, and notice of non payment given. *Chitty on Bills*, 446. *Darbishire vs. Parker*, 6 *East. Rep.* 4, 9. 2 *Caine's*, 369. *Cruger vs. Armstrong and Barnwall*, 3 *Johns. Cases*, 5. 4. Every endorsement contains in itself a guarantee by legal operation. In an ordinary case, the holder of a bill is bound to demand payment in a reasonable time, and give notice; the reason is, that the drawer may have an opportunity of getting his funds from the drawee: now does not the same reason apply to a case, where a word which the law would imply is introduced by the parties? *Hollow vs. Wilkins*, 1 *Barn. and Cres.* 10. A guarantee is a conditional undertaking, and due diligence must be used to get the money from the party primarily liable, else the guarantor is discharged. *Mantz* having accepted the bill, became the debtor of *Davis*, and *Leab* could take no steps to recover the money: *Davis* held the bill so accepted for more than 12 months. Notice must be given in the case of an express guarantee, provided the drawee be solvent when the debt becomes due. *Chitty on Bills*, 265. *Nicholson vs. Gonthet*, 2 *H. Black.* 609. *Philips vs. Astling, et al.* 2 *Taunt.* 206. *Fell on Gua.* 1. 2 *Stark. Ev.* 258. *Warrington vs Furbor*, 8 *East.* 245. 9 *Serg. and Rawl.* 198. 6 *Connect. Rep.* 81, (new series.) *Bridges vs. Berry*, 3 *Taunt.* 130. 3 *Maul. and Schw.* 362. *Bayly on Bills*,

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138. A guarantee is not equivalent to an absolute promise to pay—it is conditional. *Mitchell vs. Dall*, 2 *Harr. and Gill*, 175. 4 *Conn. Rep.* 211. 2 *Caine's Rep.* 345. *French's Executrix vs. Bank of Columbia*, 4 *Cranch*. 161. *Philips vs. Astling, et al.* 2 *Taunt.* 206. 2 *Conn. Rep.* 421. 5. But if this is to be considered as an assignment of the award mentioned in the order, still it was necessary to use due diligence, and prove insolvency in the party by whom, according to the award, the money was to be paid. *Parrott vs. Gibson*, 1 *Harr. and Johns.* 398. *Boyer vs. Turner's Adm'r* 3 *Harr. and Johns.* 285. 2 *Wash. Va. Rep.* 113. 2 *Call. Rep.* 497. 2 *Henn. and Mumf.* 113, (note.) 2 *Wilson*, 358. *Clark vs. Young and Co.* 1 *Cranch*, 181. The word guarantee in the assignment does not vary the case. 16 *Serg. and Rawle*, 79. 6. If this is no bill of exchange, then it is a promise to pay the debt of another; and if so, the consideration, as well as the promise, must be in writing. *Elliott vs. Giese*, 7 *Harr. and Johns.* 457. *Wain. vs. Walters*, 5 *East.* 10. *Keonard vs. Bredenburgh*, 8 *Johns.* 29. *Fell on Gua.* 337. *Chitty on Bills*, 5.

ARCHER, J. delivered the opinion of the Court.

The act of 1825, *ch.* 117, had for its object the prevention of the reversal of judgments, unless upon the very questions submitted to the tribunals below; and was intended to remedy the evils flowing from the raising of points above, and assigning the same for error, which were never agitated below, and which, if they had been, could easily have been remedied by amendment of the pleadings, or otherwise, but which remedy was entirely lost to the party after the cause was in the appellate Court. The Legislature intended to make this Court, so far as regarded the common law cases, strictly an appellate Court, deciding every cause upon the questions submitted below, and upon none other. If general prayers are allowable, it is obvious that the mischiefs intended to be remedied by the act will not at all be obviated, because upon a general prayer, it is impos-

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sible to ascertain from the record, the point which was presented to the Court below, and upon which they decided, and we should be perpetually discussing and deciding points, which may or may not have been acted on in the subordinate Courts. The record here does not show the point upon which the Court acted; in such a case, we can neither *reverse* or *affirm*, but to effectuate the objects of the Legislature, we can dismiss the appeal, it being their intention, not that we should in such a case, continue the cause on our docket without the power of action, but that we should not entertain the appeal, unless the record showed the point appealed from. In this view of the act of Assembly, and of the prayer in this cause, it follows that the appeal must be dismissed.

APPEAL DISMISSED.

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W, in March, 1827, filed a bill against the administrators of H, who died in 1826, for an account and distribution of his personal estate. After the coming in of the answers, and the cause had been referred to the auditor, the administrators filed with the auditor, as a set off to W's claim for a distributive share, a mortgage, from her to the deceased of *personal* property to secure the payment of a debt, containing a covenant for its payment on or before the 1st January, 1810. HELD, that the plea of limitations was a bar to this mortgage.

By the act of 1715, *ch.* 23, the Act of Limitations of this State, the recovery of a debt due by specialty is barred after a lapse of twelve years.

It is a settled principle that Chancery follows the law; and acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the same subject matter.

APPEAL from the Court of Chancery.

The bill which was filed in this case by the appellant, *Ann Watkins*, and others, representatives of *Benjamin Harwood*, deceased, on the 14th of March, 1827, against the

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appellees, *Richard Harwood of Thomas, and Henry H. Harwood*, administrators of the said *Benjamin Harwood* and others, was for an account and distribution of the personal estate of *Benjamin*, who departed this life, as stated in the bill, some time in the month of January, or February, 1826, intestate. Upon the coming in of the answers, the Chancellor at July term, 1827, passed an interlocutory decree, referring the case to the auditor, with directions among other things, to state "an account of the personal estate of the said *Benjamin Harwood* in the hands of his administrators, and distributing the same amongst those entitled." After the case had been so referred to the auditor, the administrators of the said *Benjamin Harwood*, filed a certified copy of a mortgage from the said *Ann Watkins* to the said *Benjamin Harwood*, dated February 27th, 1809, of sundry personal property, consisting of negroes, horses, cattle, hogs, beds and bedding, and tobacco, to secure to the said *Benjamin* the sum of £243 15 shillings, current money, with interest, to be paid on or before the first day of January then next ensuing, with a covenant for the payment of the same at the period mentioned; and the said administrators contended that they had a right to retain the amount thereof, out of the said *Ann's* distributive share of the estate. To this mortgage, the act of limitations was pleaded; and the auditor considering the claim founded upon it barred by the statute, excluded it from his account.

BLAND, Chancellor, at September term, 1827, rejected the statement of the auditor, and again referred the case to him, being of opinion that the debt secured by the mortgage was not barred by the statute of limitations, and ordered him to state an account accordingly. From this order the present appeal was taken.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

Boyle and *Flusser*, for the appellant, contended,

1. That the claim secured by the mortgage ought not to have been allowed. They argued, that if the mortgagee had brought *trover* for the property, the limitation to that action, as prescribed by the act of Assembly, would have applied, and if pleaded, the plaintiff must have been defeated. If an action of debt had been brought on the covenant in the deed, twelve years would have been the bar. In this case the mortgagee is not attempting to enforce his lien, but uses his deed as a set off, and necessarily, therefore, as a mere evidence of debt.

2. The mortgage not being relied on in the answer, is not evidence, not being within the issue. They insisted that if the act of limitations is not expressly applicable to the Court of Chancery, but is adopted by analogy, we are to look to our own Courts for analogies; and if an action at law on the covenant, would be defeated by a plea of the statute, the Court of Chancery cannot give the party the benefit of it, when the same plea is interposed. They cited *Deloraine vs. Brown*, 3 Bro. Ch. Rep. 639. (note.) *Demarest vs. Wynkoop*, 3 John. Ch. Cases, 135. *Trash vs. White*, 3 Bro. Ch. Rep. 291. 1 Coven. Pow. 399, (a.) *Giles vs. Baremore*, 5 Johns. Ch. C. 552. 2 Pow. on Mortg. 775. *Hill vs. Chapman*, 11 Ves. 240. *Smith vs. Clarke*, 12 Ves. 480. *Harwood vs. Rawlings*, 4 Harr. and Johns. 126. The act of 1715, ch. 23.

A. C. Magruder, for the appellees, contended,

That limitations did not apply to a mortgage, either of real or personal property. He insisted that if an action at law had been brought for the property, limitations would have been no defence, the possession of the mortgagor not being adverse; he referred to 2 *Caine's Cases in Error*, 200.

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1 *Fonb.* 323. 2 *Fonb.* 267, note (o.) 1 *Madd. Ch. Prac.* 428, 429.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This cause lies within a narrow compass. Here the judge referred to the proceedings, and then said, it is to be observed that this mortgage was not insisted upon, nor set up in the answer, but the amount of the debt supposed to be due claimed for the first time before the auditor, as a set off against the distributive share of the appellant.

This debt became due and payable by the stipulation and covenant in the mortgage on the 1st of January, 1810, more than 16 years before the death of *Benjamin Harwood*, the mortgagee, who died in the year 1826. An attempt has been made in argument, to assimilate this case to that of a proceeding in *England*, by a mortgagee of land, against a mortgagor in possession for foreclosure; where the right to foreclose, is only barred by a lapse of twenty years, without any payment of interest, or other recognition of the mortgage debt, in analogy to a debt by bond, which is there presumed to be paid, after a lapse of twenty years, without any recognition of the debt. But we do not perceive the analogy between that case and this. It is not a proceeding to foreclose, or in any shape against the thing mortgaged: besides, this is a mortgage not of real estate, but of personal property, very perishable personal property, negro men, horses, cattle, hogs and tobacco. And whether it has perished or not, or whether it ever passed into the hands of the mortgagee, or has continued to remain in the possession of the mortgagor, no where appears.

By the act of 1715, *ch.* 23, the act of limitations of this *State*, the recovery of a debt due by specialty, is barred after a lapse of twelve years. This is claimed as a mere debt, by way of set off against the distributive share of the appellant, and the mortgage is offered as evidence of that debt; and the question is, whether the plea of the act of limitations ought to have been allowed. It is a settled

principle that Chancery follows the law ; and acting in obedience to the statute, the plea of limitations is as available in equity, as at law, in relation to the same subject matter. Here, the subject matter is a debt of 16 or 17 years standing, (with no recognition of it during the whole of that time) that is claimed to be allowed as such, in the statement of the account by the auditor, an action for the recovery of which, in a court of law, on the covenant in the mortgage, would be barred by the act of limitations. And we think it is equally barred in Chancery, and that the plea of the appellant ought to have been allowed. The decree of the Chancellor, therefore, so far as it disallows the plea of the act of limitations by the appellant, is *reversed*.

DECREE REVERSED.

PURVIANCE and DORSEY Adm'r of DORSEY vs. BARTON,
Adm'r *de bonis non* of BARTON.—June, 1830.

Under the act of 1820, *ch.* 161, *sec.* 1, the Chancellor is not authorised to take a bill as confessed, and entirely disregard the testimony which the interlocutory order directed in that act to be passed, requires to be taken, under an *ex parte* commission to support the allegations of the bill. The final decree in such case must be sanctioned by the evidence taken under the commission.

APPEAL from the Court of Chancery.

The bill, which was filed in this case by the appellee, on the 31st of January, 1825, sought to charge the appellants, *John Purviance* and *John R. Dorsey*, administrator of *Walter Dorsey*, with the sum of \$1,233 27, which it alleged the said *John* and *Walter* owed to *Seth Barton*, the intestate of the complainant. As the decision turned upon the true meaning of the act of 1820, *ch.* 161, and the merits of the case were not involved, it is not necessary to set out the particulars of the complainant's claim, as presented by the bill. The *subpæna* which issued upon it, was returnable to March term, 1825 ; and accordingly at that term, it

was returned, “summoned *John Purviance*,” “*non est Dorsey*.” Afterwards, and at the same term, the complainant filed the following petition: The petition of the complainant humbly sheweth, that on the 31st of January, 1825, he filed his bill in the above cause, and that *subpæna* was accordingly issued, and hath been returned “summoned” as to the said defendant *Purviance*, and “*non est inventus*” as to the said *Dorsey*. That the said *John Purviance*, hath neglected to appear, or file an answer within the time limited by the rules of Court—the complainant, therefore, prays that a commission, *ex parte*, may be issued, to take testimony in the above case, agreeably to the act of Assembly in such case made and provided.

BLAND, Chancellor, (March Term, 1825.)

The defendant, *John Purviance*, having been returned “summoned,” and having failed to appear in person, or by solicitor, according to the exigency of the writ, within the time limited by the rules of Court, it is thereupon ordered and decreed, that the complainant is entitled to relief; but as it does not appear to what relief he is entitled, it is further ordered, that commission issue to *Josias Pennington*, and *Robert Wilson, Jr.* to take testimony on the part of the complainant, in support of the allegations contained in the bill.

A commission accordingly issued, under which proof on the part of the complainant was taken, and returned to March term, 1826. At July term, 1826, the defendants, *Purviance* and *Dorsey*, appeared, the *subpæna* against the latter having at the same term been returned “summoned,” after the *subpæna* was so returned, and before the appearance of the defendant, *Dorsey*, similar proceedings were had against him, as had been pursued against his co-defendant, *Purviance*. The second commission, and the proof taken thereunder, was returned to March term, 1827; at that Term, neither of the defendants having answered the bill.

BLAND, Chancellor, passed the following decree :

This case standing ready for hearing on the bill and interlocutory orders, and having been submitted by the solicitor for the plaintiff, the proceedings were read and considered. The commissions heretofore issued to take testimony having been returned, and the defendants not having answered—whereupon it is, on the 25th day of June, 1827, by *Theodorick Bland*, Chancellor, and by the authority of this Court, adjudged, ordered, and decreed, that the said bill of complaint be, and the same is hereby taken, *pro confesso*—and it is further adjudged, ordered and decreed, that the said *John Purviance*, and the said *John Robert Dorsey*, administrator of the said *Walter Dorsey*, forthwith pay, or bring into this Court to be paid, unto the said *Thomas B. Barton*, administrator *de bonis non* of the late *Seth Barton*, the sum of \$1233 27, with legal interest thereon, from the 5th day of February, 1805, until paid, and costs, &c.

From this decree the defendants, on the 18th of July, then following, appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

Johnson, for the appellants, contended,

1. That under the circumstances of this case, independent of the evidence taken under the commissions, a decree, *pro confesso*, could not be passed.
2. That if there could have been such a decree, had there been no evidence, the evidence was such as to render such a decree erroneous.
3. That the evidence in the cause shews no liability on the part of the defendants, or of either of them, for a money claim, to the complainant.
4. That if the evidence does shew any such liability, it is not for the amount decreed against them.
5. That there are not proper parties.

1. Prior to the act of 1820, the power of the Chancellor, and the manner of taking bills *pro confesso*, was regulated by the following acts of Assembly: the act of 1785, *ch. 72*,

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sec. 19, 20—1795, *ch.* 88—1797, *ch.* 114—1799, *ch.* 79, *sec.* 2, 5, 9—1818, *ch.* 193, *sec.* 5. Under the act of 1820, *ch.* 161, the Chancellor has no power to take bills *pro confesso*, except in the cases provided for in the 2d section; but if he has the power, still when he orders a commission, he must decree in conformity with the proof taken: as the bill was not authorised to be decreed on as confessed, so that the decree was not warranted by the proof. The unanswered allegations of a bill are not admitted. *Warfield vs. Gambrill*, 1 *Gill and Johns*. 503. All the allegations of this bill being unanswered, the whole must be proved. The form of the interlocutory order shows, that the Chancellor supposed he could not decree finally, without a commission; and if so, can it be contended that he is at liberty to disregard the proof taken under it? If the bill is to be taken as confessed, where can be the necessity for proof? The construction which allows bills in cases like the present to be taken *pro confesso*, dispenses entirely with the 2d section of the act, which gives the power so to treat a bill, charging matters in the private knowledge of the defendant: why should the Legislature have specially given the power, in reference to such bills, if under the 1st section, the power was conferred in regard to all bills? The act says a commission shall issue to take proof in support of the allegations of the bill—if the construction contended for on the other side be right, then an appeal would lie from the interlocutory order, which never could have been intended; the effect of the interlocutory decree, is merely to decide that the complainant has presented a case, which, *if true*, entitles him to relief.

Taney, (Att'y Gen'l.) *contra*.

These proceedings can only be supported under the act of 1820, *ch.* 161. That act does not affect the rights of property, but merely regulates the practice of the Court of Chancery, and therefore the construction put upon it in that Court, will be respected here, unless it be clearly

shown to be erroneous. The object of the Legislature in passing this law, was to prevent delay, an evil to which the Court of Chancery was obnoxious; and as the practice under it, (now complained of) has effected that object, there can be little doubt that it harmonises with the intentions of the Legislature. The objection that injustice might be done, is answered by remarking, that the Chancellor must exercise a sound legal discretion; and there can be no doubt, that upon presenting to him an equitable case, he would open or rescind the interlocutory order, it being in his power to do so, during the term, and admit the party to answer. The interlocutory order spoken of in the act of 1820, is similar to a decree by default—it is certainly not a mere order for a commission, which is no decree at all. It is in the nature of a judgment by default at law, upon *nil dicit*: the Chancellor is bound to pass it, and he has nothing before him but the bill—neither answer or evidence. The commission to take evidence after default, is in the nature of a writ of enquiry; the preceding efforts of the Legislature to render the proceedings of the Court of Chancery less dilatory, having failed, they are to be presumed to have had in view the practice of courts of law in regard to defaults. In relation to proceedings at law on judgments by default, he referred to 2 *Bac. Abr.* 276, note (a.) 3 *Stark. Ev.* 1771. If, in the case of a default, the amount to be recovered depends on figures, there need not be a writ of enquiry—assuming the statement in the declaration to be true, the judgment by default admits every thing. The Chancellor was right, therefore, in founding his decree on the statements of the bill, it being a mere matter of calculation, and the bill containing every statement which it would have been necessary to prove. The interlocutory decree decides that the party is entitled to relief, and entitled in the character in which he sues—the amount of the claim, then, is the only matter to be proved under the commission, considering the decree such a judgment by default, as would require a writ of enquiry. If the proof

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under the commission does not precisely correspond in amount with the sum decreed, this Court, in reversing, would decree for the sum proved to be due the complainant.

MARTIN, J., delivered the opinion of the Court.

We have carefully examined this case, and think it is not attended with much difficulty, when freed from objections which do not legitimately belong to it, but which have been urged with great ability and ingenuity. It would seem from the argument, the true construction of the act of 1820, *ch. 161, sec. 1*, is only to be collected from the interlocutory order it directs. This order is a mere subordinate feature in the law, and its aid is not required to explain that which is clear and manifest without it: give to it what name or character you please, it cannot authorise the Chancellor to take the bill *pro confesso*, and entirely disregard the testimony, which the order itself states to be necessary to a correct decision, and which the act of 1820 requires, to *support the allegations in the bill*. Independent of the provisions of that act, the proceedings in this case appear inconsistent on the face of them. If the bill was to be taken *pro confesso*, and as such would justify a final decree, was it not a mockery to issue a commission to take testimony, when the testimony under it was to have no effect, but to be treated as a mere nullity? It has been conceded by the counsel for the appellee, that unless this proceeding is authorised by the act of 1820, *ch. 161*, the decree cannot be sustained. Before the passage of this act, a commission could not be issued to take testimony until the defendants answered, and the cause was at issue—to prevent the delay consequent upon this course of proceeding, gave birth to the *first section* of the act of 1820. By that section it is declared, where a *subpœna* has been issued, on a bill in Chancery, and returned summoned, as to all, or any of the defendants, and the said defendants, or any of them so summoned, shall fail to appear, or having appeared, shall fail to answer, the Chancellor, upon the application of the com-

plainant, shall enter an interlocutory decree in such case, and issue a commission, *ex parte*, to take testimony *to support the allegations in the bill*; which commission shall be issued, proceeded in, and returned, in the same manner, and the testimony returned *shall have the same effect*, as if issued and returned in the *usual* way, on answer, general replication and issue, and the Court shall proceed to a final decree in the cause, *in the same manner* as if the defendant or defendants had appeared and put in their answer. It is difficult to suggest any language which could express in a more clear and explicit manner, the object of the Legislature in passing the law, and the course directed by it to be pursued in the Court of Chancery. Upon the non-appearance of the defendant, or his failure to put in an answer, an *ex parte* commission shall be issued to take testimony—for what purpose? The act tells us explicitly, *to support the allegations in the bill*. Why take testimony to support the allegations *in the bill*, if the bill is to be taken *pro confesso*, and is sufficient to justify a final decree, without any proof of those allegations? But the act does not stop here—it leaves nothing for construction, but points out, in the most unequivocal terms, the effect that is to be given to the testimony thus returned, and *the decree that the Chancellor is to pronounce in the cause*. It declares the commission shall be issued, and the testimony taken under it *shall have the same effect* as if issued and returned in the usual way, on an answer, general replication and issue, and the Court shall proceed to a final decree in the cause, *in the same manner as if the defendant had appeared and put in his answer*—thus clearly intending to place a cause upon the return of an *ex parte* commission, in the same situation as if a commission had been issued after answer, &c. filed, and that the Court of Chancery should proceed to a final decree in both cases, in the same manner. If the first section of this act was ambiguous and doubtful, we might call in the second section to aid in its construction—but this we deem unnecessary. The decree in this

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case, taking the bill *pro confesso*, was not authorised by the act of 1820, and it is therefore reversed, and the bill dismissed, but without prejudice.

DECREE REVERSED.

McCAULEY, *et al.* vs. GRIMES AND WIFE.—June, 1830.

M purchased a tract of land, which at his request was conveyed to his son C. At this time C was a minor, and did not attain his majority until after his father's death. M bequeathed pecuniary legacies to his son H, and other children, except C. After M's death the children entered into a parol agreement to divide equally the real and personal estate of their father, and in pursuance thereof, C conveyed this land to H then a married man, in fee, who gave bonds to the children for, and executed a mortgage of the land to them, to secure the payment of, their several shares of their father's estate. The deed, mortgage and bond were all executed at the same time. Upon H's death it being ascertained that the land was insufficient to pay the mortgagees, if subject to a claim of dower in favor of H's widow, HELD, That she was not entitled to dower.

There is no general rule, in strictness, that in cases of instantaneous seisin the widow shall, or shall not, be entitled to dower. This must depend as well upon the character of the seisin, as its duration.

Where a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed.

Where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed.

Where one is seised for the combined use of himself and others, and his interest, real or contingent, is not susceptible of any particular ascertainment, but is necessarily undefined, and is to be postponed until the gratification of all the uses to which his seisin is subservient, it is not a case of beneficial seisin for his own use, so as to endow his wife to the prejudice of the other uses.

APPEAL from *Washington County Court*.

This was an action of *Dower*, commenced on the 2d of November, 1825, by *James Grimes*, and *Catharine* his wife, (the appellees) against the appellants, *John McCauley* and others, for one-third part of a tract of land called "*Conococheague Manor*," and of a tract called "*Number*

Five," one of the reserves of said manor, situate in *Washington* County. There was a judgment, by confession, for the demandants, subject to the opinion of the County Court, on the following statement of facts :

"It is admitted that *Charles McCauley*, deceased, purchased in his life time, the land in the declaration mentioned, from a certain *Frisby Tilghman*, who, at his request, conveyed the same to his son, *Charles McCauley, jr.* in fee simple, by deed dated August the 20th, 1808, in consideration of the sum of £ 4495 10 shillings. That at the time of the execution of said conveyance, *Charles McCauley, jr.* the grantee, was a minor, and did not attain his majority until after the death of his father. That *Charles McCauley* the elder, deceased, bequeathed to his son *Hugh*, a legacy of £1000, and to each of his other children, except his son *Charles*, the sum of £500. That after the death of the elder *Charles McCauley*, and the arrival at age of his son *Charles McCauley, jr.* he, together with his brothers and sisters, entered into a parol agreement that they would divide and share equally, the real and personal estate of their father, without regard to the superior value of the property given to *Charles* over the rest, by the deed from *Tilghman* before mentioned. The precise terms of the agreement, however, were not known, until all the parties met at the office of counsel, on, or shortly before the 8th of February, 1822, when the counsel was informed of the agreement which had been entered into, and he was requested to have a deed prepared from *Charles McCauley, jr.* to *Hugh McCauley*, for the land in the declaration mentioned, for the purpose of carrying the said agreement into effect; which was, that *Charles* should convey by deed of bargain and sale to his brother *Hugh*, the land which had been conveyed to him, *Charles*, by the aforesaid *Frisby Tilghman* ; and that *Hugh*, in consideration thereof, should pay to his brothers and sisters, certain stipulated sums of money ; and to secure the payment of the same, he should at the same time that he received the deed from *Charles*, execute a mortgage to

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them of the same lands, together with his bonds for the payment of the several sums of money, which it was agreed each should have as their respective portions of their father's estate. That in pursuance of said agreement, the deed and mortgage, (in which the deed is recited) and bonds were all executed, at the same time, on the 8th of February, 1822, by the said *Charles* and *Hugh McCauley*. The marriage of the demandant *Catharine*, to *Hugh McCauley*, the grantee in the deed from *Charles*, prior to its execution, and prior to the execution of the mortgage, and the death of *Hugh* subsequently, were also admitted. It was further admitted, that the said *Hugh McCauley* made certain payments on account of the said bonds and mortgage, during his life, amounting to about \$2500, and that about the same amount has been paid since, on the same account, by his personal representative. That in the division of the father's estate, the proportion of the said *Hugh* in the land was taken into the estimation, and the aforesaid mortgage and bonds to his brothers and sisters were executed for the balance. That said *Hugh* made valuable improvements on said land, and that it will not sell for more than the balance due the mortgagees, especially if encumbered with the widow's dower. It was further admitted, that *James Grimes*, one of the appellees, intermarried with *Catharine*, the other appellee, prior to the institution of this suit. If upon the preceeding statement, the County Court should be of opinion, that the seisin of the said *Hugh McCauley* was such as to entitle his widow to dower of the said lands, then judgment to be entered for the demandants; otherwise for the defendants, either party reserving the right to appeal, or sue out a writ of error. The County Court gave judgment for the demandants, and the defendants appealed to this Court.

This cause came on to be argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

Yost, for the appellants.

The seisin of *Hugh McCauley* was instantancous, and does not entitle the widow to dower. 2 *Black. Com.* 124. 1 *Thos. Coke, Lit.* 124, note (G.) The seisin in this case, was not beneficial to the grantee, he was merely a trustee for the use of others. The deed and mortgage having been executed at the same time, and in pursuance of a previous agreement, are to be considered as one and the same instrument. *Powel on Contracts*, 410. 2 *Blk. Com.* 331. *Peterson vs. Clarke*, 15 *Johns. Rep.* 205. *Roe. on demise of Noden vs. Griffiths, et al.* 4 *Burr. Rep.* 1962. *Vaughan vs. Atkins*, 5 *Burr.* 2787. *Jackson vs. Dunsbagh*, 1 *Johns. Cases*, 95. 4 *Massa. Rep.* 556. *Stow vs. Tift*, 15 *Johns. Rep.* 463. *Clark vs. Munroe*, 14 *Massa. Rep.* 351. 1 *New. Hamp. Rep.* 75. *Bingham on Infancy*, 11. If *Hugh* upon getting the deed from *Charles*, had refused to execute the mortgage in accordance with the previous agreement, a Court of Equity would have compelled him, and parol evidence would have been let in, to show what that agreement was. The action of the Court would have rested on the ground of fraud, but the fraud could only be detected, by resorting to parol proof. It does not appear whether, in point of fact, the execution of the deed preceded or followed the execution of the mortgage, nor does its validity depend upon its previous execution, for a mortgage with a warranty would convey the after acquired title. *Jackson vs. Matsdorf*, 11 *Johns. Rep.* 97. 108. *M'Cracken vs. Wright*, 14 *Ib.* 194. Looking at the case stated, no time could have intervened between the execution of these instruments, as they are stated to have been executed at the same time. But if the deed is to be taken, as having been first executed, the grantee took subject to the agreement, and the equities growing out of it. It was subject to a charge when it passed

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to him, and his widow, therefore, cannot have dower. Where several instruments are executed at the same time, between the same parties, in relation to the same subject matter, they are considered as one. *Holbrook vs. Finney*, 4 *Massa. Rep.* 569. *Stow vs. Tiffit*, 15 *Johns. Rep.* 459. *Jackson vs. Dewitt*, 6 *Cowen.* 316. There could have been no substantial and beneficial seisin in *Hugh McCauley*; he was a mere trustee for the use of the mortgagees.

Price, for the appellees.

The principle contended for on the other side, that an instantaneous seisin does not entitle the wife to dower, is not a sound one. The general rule is the reverse, and the cases cited by the counsel for the appellants are exceptions. 2 *Bac. Ab.* 371, and note. 1 *Thos. Coke*, 576, (*London Ed.*) *Bingham on Coverture*, 313, 314. 2 *Black. Com.* 124. The instantaneous seisin which does not confer the right of dower, is that which the party holds for the benefit of another. If he has seisin for his own use, though but for a moment, the wife has dower. When the vendor conveys to the vendee the title is gone, because what is conveyed cannot be retained; if it could, why take a mortgage? In this case the mortgage recites the deed as one already executed, and being an absolute deed, the title vested in the grantee, and there remained until the mortgage was executed. If the mortgagees here have any title, they derive it from *Hugh McCauley*. If he had none, they have none. *Bingham on Coverture*, 314. *Coke Lit.* 576, (*note.*) It is admitted that if a contract consists of several parts, you must take them altogether, because you cannot without doing so ascertain the intention of the parties. But still the question of the operation of the contract remains to be decided. *Pow. on Contracts*, 410. The deed to *Hugh McCauley* vested in him a fee simple estate, and entitled his wife to dower, and the agreement in virtue of which it was made, and the mortgage executed by him, to neither of

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which she was a party, cannot deprive her of that right. As exemplifying the kind of instantaneous seisin which gives the right of dower, he cited 2 *Bac. Abr.* 371. *Clark vs. Munroe*, 14 *Massa. Rep.* 351, and the opinion of *Thompson, Ch. J.*, in *Stow vs. Tift*, 15 *Johns. Rep.* 464. *Nash vs. Preston, Cro. Ch.* 191. By the act of 1825, a preference is given to a mortgagee over previous judgment creditors, but this would not have been necessary if the mortgagor is considered as acquiring no title by the deed to him from the mortgagee. The mortgagor is the substantial owner of the land. By paying the debt, his title is made absolute. *Ford vs. Philpot*, 5 *Harr. and Johns.* 315. Suppose *Hugh McCauley* had paid the mortgage debt, his title, like the title of all other mortgagors, would have become unfettered.

ARCHER, J. delivered the opinion of the Court.

The record presents in effect the same principle for adjudication, which has heretofore come before the Courts in several States of the Union. In *Holbrook vs. Finney*, 4 *Massa. Rep.* 566, it was decided that a conveyance in fee, and a conveyance by the grantee to the grantor by way of mortgage being considered as parts of the same transaction, did not give to the grantee such a seisin as entitled his wife to have dower in the granted premises. And in *Clarke vs. Munroe*, 14 *Mass.* 352, where the mortgage was made to a third person, at the same time with the deed to the mortgagor, the same determination was had; in each of those cases the deeds were executed in pursuance of a previous agreement between the parties. In *South Carolina*, the same doctrine had prevailed before, as will be seen by a reference to *Bogie vs. Rutledge*, 1 *Bay*, 312; this decision has been recognised, and approved in that State in a very recent decision. *Trustees of Frazier vs. Centre and Hall*, 1 *M' Cord*, 279; these determinations have been followed in *New York*. In *Stow vs. Tift*, 15 *Johns.* 458, the case in 4 *Mass.* 566, was cited and approved, and a judgment

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given in conformity with it; in the latter case, however, no agreement was proved, further than could be inferred from the execution of the conveyance and mortgage, and the internal evidence they furnished. In *Pennsylvania*, too, the same doctrine prevails—in *Reed vs. Morrison*, 12 *Sergeant and Rawle*, 70, it was adjudged that as against the mortgagee for the purchase money, the widow had no such seisin as would entitle her to dower. So far as we have examined the *American* cases, the decisions appear to be uniform against the widow's right to dower, unless subject to the payment of the purchase money secured by mortgage—and Chancellor *Kent*, in his recent treatise on the law of real property, approves these determinations. 4 *Kent's Com.* 38, 39. The cases in *Massachusetts* and *New York*, proceed on the doctrine of instantaneous seisin. The deed and mortgage were looked upon as constituting but one contract, bearing the same date, and delivered at the same time; and that as no interval of time intervened, between the taking and rendering back the fee, the case might be assimilated to the conusee of a fine, whose wife would not be entitled to dower, because by the same fine the estate is rendered back to the conusor; it was there considered as merely *in transitu*, and not resting for an instant; the grant and render being one entire act. But perhaps there is no general rule in strictness, that in cases of instantaneous seisin the widow shall or shall not be entitled to dower; this must depend as well upon the character of the seisin, as its duration; when a man has the seisin of an estate, though for an instant, *beneficially for his own use*, his widow shall be endowed; where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed. 1 *Thomas Coke*, 665, 666, note G. *Preston Est.* 546. 2 *Bac. Abr.* 371; here the husband was the mere instrument to carry into effect the purposes of the grantor—he takes the fee, that he may instantaneously pass it out of him to certain mortgagees who are the objects of the grantor's bounty,

and whom he designates as the persons to receive the purchase money; and it is not a portion of the lands by metes and bounds, or any undivided part of it, that he is thus the instrument for passing away, but it is the fee in the whole land; and it is done *ex uno flatu*. But it is supposed that he was *beneficially seised for his own use*; the situation in which the grantee stood could not, we apprehend, bring him within the operation of this general rule; he was seized beneficially for the use of his brothers and sisters, and whether his interest was ultimately to be beneficial, was entirely contingent, and dependent upon the capacities of the estate to meet the claims of his brothers and sisters. This we apprehend is not the kind of beneficial interest, the seisin of which, to his own use, would entitle the wife to dower—he was not in fact within the words or spirit of the rule, for he was not seized beneficially for his *own* use, but for the *combined use of himself and others*, and his interest, real or contingent, was not susceptible of any particular ascertainment, but was necessarily undefined, and was to be postponed until the gratifications of all the uses to which the lands were made subservient.

It is remarked by *Kent*, 4 *Com.* 38, 39, “That a transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower; the same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person to secure the purchase money, in whole, or in part; dower cannot be claimed as against rights under that mortgage—the husband is not deemed *sufficiently* or *beneficially* seized by such an instantaneous passage of the fee, in and out of him, to entitle his wife to dower as against the mortgagee, and (he further remarks) this conclusion is agreeable to the manifest justice of the case.”

There is no case in the *English* books which militates against these doctrines, unless it should be the case of

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Nash vs. Preston, Cro. Ch. 191; but if the interpretation given to it by the Courts in *Massachusetts* and *New York*, that the re-demise was not made at the time of the deed of bargain and sale, be found to be correct, it will not interfere with the *American* cases. The justices to whom in that case the question of dower was referred, say it "*was intended they should have it re-demised immediately.*" It is fair to infer from this declaration, that the re-demise was not executed at the same time with the deed of bargain and sale, and if it was not, it does not at all conflict with the *American* cases.

JUDGMENT REVERSED.

STOCKETT vs. WATKINS' Admr's.—June, 1830.

A was Adm'r. *d. b. n.* of S, and Ext'r. of L, the widow of S. In an action brought against him for the use and occupation of land, and hire of negroes, it appeared that the plaintiff had a deed for certain land and negroes from S, who retained possession until his death, when his widow, who was his sole devisee and executrix, continued that possession, and shortly after filed her bill in Chancery to have the plaintiff's deed, which was absolute in terms, decreed a mortgage; before that cause was decided the widow also died. The defendant, as her Ext'r, and as Ad. *d. b. n.* of S, and in conjunction with her devisee of the land, filed a bill of revivor, and after much litigation, the plaintiff's deed was sustained. The defendant had, in fact, entered upon and rented out the land, and used the negroes conveyed to the plaintiff, after the widow's death, and had frequently said, if the bill was decided in favor of the plaintiff, the rent of the land, and the hire of the negroes, would be payable to him. Upon the decision of the cause, the land and negroes were delivered up to the plaintiff, and the accruing rent of that year paid to him by the tenants. It did not appear under what circumstances the defendant had originally entered into the land. HELD, that the widow's admissions, that she held the land and negroes as the plaintiff's tenant, and by his permission, were not competent evidence to charge the defendant; that the evidence was not sufficient to warrant the inference, that the relation of landlord and tenant subsisted between the plaintiff and defendant, the facts and circumstances not

being such as usually attended a permissive holding; but that he was responsible for the hire of the negroes, during the time he had them. To maintain the action for use and occupation, it is not necessary for the plaintiff to prove an express contract with the tenant, when he first takes possession, nor an express reservation of a certain rent, nor that the tenant has paid rent. It may be maintained on an implied undertaking where the permissive holding is established; and if it appears that a certain rent was reserved, the reservation may be used to regulate the damages.

If one enters as a trespasser, the action for use and occupation cannot be maintained.

The law sometimes implies contracts, but never when there is an express contract, or facts exist wholly inconsistent with the contract to be implied. Where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the *tort*, and sue in *assumpsit* for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the *tort*, and then recover their value for the time of their detention in *assumpsit*.

ERROR to Anne Arundel County Court.

This was an action of *Assumpsit*, commenced on the 11th of October, 1825, by *Nicholas Watkins of Thomas*, (the intestate of the appellees,) in his life-time against, *Joseph N. Stockett* the appellant, for the use and occupation of land, and for the labor and services of certain negroes. Upon the death of the said *Nicholas Watkins of Thomas*, *Rachel H. Watkins*, and *Benjamin Watkins*, his administrators, (the appellees) appeared, and were made parties to the suit. The defendant pleaded, *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit*, &c. Issue to the first, and general replication and issues to the last pleas.

1st. EXCEPTION. At the trial the plaintiff having read the proceedings in Chancery, in the case of *Stockett vs. Watkins*, (6 *Harr. and Johns.* 435,) and the decision of the Court of Appeals, (which by consent are made parts of this bill of exceptions) gave in evidence by one *John Beard*, that in the year 1822, he hired *Sam* the elder, (one of the slaves mentioned in the deed of 28th June, 1816, which was read in evidence from the proceedings

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in Chancery,) from *Joseph N. Stockett*, the defendant. And on the 12th October, 1825, settled with *S*, for his hire, at thirty dollars per *annum*; that he objected to the amount, but *S*, replied, “Dont ask me to take off the wages; I cannot do it, for I have to pay it all away to *Watkins*.” That afterwards in a subsequent conversation, the witness heard the defendant say, that all the rent of the place, and the hire of the negroes the witness had employed, he *S*, had to pay away to *W*, as the case was then decided. The rent of the place was one thousand pounds of tobacco in 1819, and 1820, by valuation. That *John Stockett* was in possession of this place in 1816, and before, and then sold it to *W*, the original plaintiff. That after his death, *Mrs. Lurana Stockett*, his wife, whom he constituted his executrix, and sole devisee, continued in possession of the land and negroes until her death, and that after her death the defendant, her executor, entered and took possession of the property, and hired out the farm to *Nicholas Knighton*, one year, for one thousand pounds of tobacco; that *Mrs. S*, died in 1818, having made her will, which appears to have been proved 31st October, 1818. And the plaintiffs then called *James Davidson*, who proved, that he was called upon by the defendant *S*, to value the rent of the farm in 1821, and valued it at one thousand pounds of tobacco. And it was rented by *S*, for that sum to *Knighton*. In 1825, the witness rented the place from *S*, the defendant, at the same price. That *S*, the defendant, told him when he took possession, that the rent must be paid to him, or to *W*, the intestate, according to the decision of the cause in the Court of Appeals.

The plaintiff's counsel then offered to prove, that the defendant entered under *Mrs. Stockett*, claiming in her right, and that she had declared to the witness, *Stephen Beard*, that she had entered upon the land and held the negroes, under and by the permission and consent of the intestate *W*, and acknowledged that she held both the land and negroes, as the tenant of the plaintiffs. And the plain-

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tiffs further offered to prove, that the defendant, after her death, had entered and held claiming in her right, and further offered to prove the value of the land and negroes during the time the defendant had held the same after the death of *Mrs. S*, by himself or his agents. The defendant by his counsel objected to any proof being offered in this cause relative to admissions or acknowledgements by *Lurana S*, in connexion with the other evidence as offered to be proved to the jury, and the Court [KILGOUR and WILKINSON, A. J.] refused to let the same be given in evidence to the jury, being of opinion that the defendant in this cause was charged in the declaration with his own individual acts, in his individual capacity, and that the plaintiffs could not be permitted by parol proof to establish a relation with another, to make the defendant answerable representatively for the acts of such other person, and of which relation the record exhibited no evidence. The plaintiffs excepted.

2d. EXCEPTION. The plaintiffs having given in evidence, in addition to the matters stated in their first bill of exceptions, the annual value of the land and negroes for which this action is brought, rested their cause. Whereupon the defendant offered in evidence a writ of *Replevin*, issued on the 8th April, 1818, out of *Anne Arundel County Court*, by *Nicholas Watkins of Thomas*, against *Lurana S*, with the avowed object of showing that *Mrs. S*, was then in the adverse possession of the negroes in said writ mentioned, which were admitted to be the same conveyed by *John S*, to *Nicholas W, of T*, by the deed of 28th June, 1816, on which said writ was endorsed "replevied and delivered" by the then sheriff of *Anne Arundel County*, *Robert Welch of Ben*, who being thereupon called by the plaintiffs, testified, that on the service of the said writ, by order of *N. W. of T*, and with his permission, the said negroes were not taken out of the possession of *Mrs. S*, but still left with her as the witness had found them. And the

witness informed *Mrs. S.* at the time of service, that his orders were still to leave them in her possession, and she joyfully acquiesced therein, and appeared to be thankful. And thereupon the docket entries in the said cause were produced by the defendant, by which it appeared that a *retorno habendo* bond was filed in said cause, on the 28th April, 1818, and "property returned," entered by the clerk, and the said bond was produced, and that the said cause was entered "discontinued by consent, without costs," at October term, 1822. And thereupon the plaintiffs offered to prove, that during the time *Mrs. S.* was in possession of the said negroes, both before and after the said replevin was issued, she admitted and declared to the witness, that she held and enjoyed the same under the permission and consent of the said *Nicholas W. of T.* To which evidence so offered, the defendant by his counsel objected, but the Court overruled the objection, being of opinion that the same was competent evidence in this cause. The defendant excepted.

3d. EXCEPTION. On the testimony contained in the preceding exceptions, the defendant by his counsel prayed the Court to instruct the jury, that if they should be of opinion from the evidence, that the plaintiff is entitled to recover in this suit, he can only claim under the issues and upon the evidence in this cause, so much of the rent for the land, and of the hire of the negroes, as became due within three years before the institution of this suit. But the Court refused to give the instruction, being of opinion that the declarations of the defendant, proved by the witnesses as stated in the first bill of exceptions, if believed by the jury, prevented the plea of limitations from being a bar to any part of the claim, if the jury should be of opinion that the plaintiffs have a claim, the Court thinking the whole evidence proper to be left to the jury. The defendant excepted.

4th. EXCEPTION. In addition to the matters set forth in the preceding exceptions of plaintiffs and defendant, the defendant for the purpose of proving that the relation of

landlord and tenant did not exist between the original plaintiff and the defendant, before October term, 1822, offered in evidence the proceedings in an action of ejectment brought to April term, 1818, by the original plaintiff, against *Lurana Stockett*, as the tenant then in possession of certain lands, being the same lands for the use and occupation of which this action is brought. And proved that the said suit was continued in the said County Court, until April term, 1819, when the death of the original party was suggested, upon which a *subpœna* was issued, against one *Richard Stockett*, the devisee of said *Lurana S*, who appeared, was made a party and the cause was continued till October term, 1822, when the suit was discontinued by consent, without costs; to the admissibility of which evidence the plaintiffs objected, because the said record was between different parties, and for other property, and because the said ejectment in its existing state could not legally avail the defendant in bar of the plaintiff's claim, on the issues joined in this cause, but the Court overruled the objection and admitted the evidence. The plaintiffs excepted.

5th. EXCEPTION. The plaintiffs then gave in evidence to the jury, a deed from one *John Stockett* to the plaintiff's intestate, dated the 28th June, 1816, for two tracts of land called *Doden* and *Bridge Hills*, and six negroes therein, named *Sam*, &c. Whereof the said *Stockett* was then seised and possessed, which deed was duly executed, acknowledged and recorded, and is an absolute deed on its face, for the consideration of \$800, acknowledged to be paid for the said conveyance. That the said *S*, and his wife *Lurana S*, who were living on the said plantation, at the time of the grant aforesaid, still continued to live there, and to retain possession of the said negroes, until *John S's* death, on or about the 1st March, 1818. Immediately after his death, his widow still continuing on the place, and in possession of the negroes aforesaid, sent for her relation *Stephen Beard*, a competent witness, who proved the same, and told him in great distress that she

understood Mr. *Nicholas Watkins of Thomas*, had an absolute deed of all the land and negroes, and that she desired the witness to go for Mr. *W*, and ask him to come and see her. That he accordingly notified Mr. *W*, who came there, and being asked by Mrs. *S*, if it was true that her husband had given him an absolute deed for the land and negroes aforesaid, said it was so, and produced the deed. That Mrs. *S*, was greatly distressed, and declared she was friendless, that she did not care so much for the land, but that she was desirous to live there as long as she lived. And that she was much attached to the negroes she had brought up, and intended to have set them free at her death. That Mr. *W*, assured her that she was not friendless. That he had always been a friend to her husband, and intended to be her friend; that she might still continue on the place as long as she lived, and he would not disturb her; but as to the negroes, that she had a dower right in the land, which if she would consent to sell at that time, as he *W*, had a good offer therefor, she might have the negroes, and do what she pleased with them; upon which Mrs. *S*, appeared to be perfectly satisfied, and *W*, went away, and the witness believed all matters adjusted, until shortly after he learned that Mrs. *S*, did not intend to comply with her promise to *W*, and had brought suit in Chancery against him. The plaintiffs then read in evidence the case in 6 *Harr. and Johns*. 435, by consent. By these proceedings it appeared among other things, that the original bill was filed by *Lurana S*, executrix, and sole devisee of *John S*, on the day of 1818, with two exhibits, the deed above mentioned, and the will of *John S*, which are to be deemed parts of this bill of exceptions. That Mrs. *S*, the complainant, died on or about the 31st of October, 1818, having made her will, which also is to be used from the said proceedings as there exemplified, and that subsequently, the defendant, and *Richard L. Stockett*, her devisee, became parties to the said proceedings. The plaintiffs further gave in evidence to the jury, that soon

after *Mrs. S's* death, the defendant took possession of the plantation, and assumed the control and disposal of the negroes, and held the same by himself, or his under tenants, and agents, until July, 1825. And the plaintiff then proved all the facts in relation to the valuation and renting of the land, and use and hire of the negroes mentioned in the other exceptions. And that the witness has since paid the rent of that year, accordingly to *Mr. W*, without any objection from the defendant, who has never asked him for the said rent. The plaintiffs further gave in evidence, that in the months of July, 1825, the defendants delivered up the possession of the said land and negroes, to the plaintiffs intestate, as the said cause was then decided in his favor, in the Court of Appeals. And the defendant gave in evidence to the jury a writ of *replevin* and proceedings under it, as mentioned in the second bill of exception—and those in the action of ejectment in the fourth exception.—Whereupon the plaintiffs called *Stephen Beard* to prove the declarations and admissions of *Mrs. S*, while she was in possession of the said property, as to the nature and character of her possession, which evidence was then admitted by the Court, and given to the jury as herein before stated, and then both parties rested the evidence in this cause.

The plaintiff's counsel then prayed the Court to instruct the jury, upon all their evidence contained in the 5th bill of exceptions, as follows :

1. That it was sufficient in law, to authorise the jury to infer the relation of landlord and tenant, as existing between *W*, and this defendant, during the possession of the said *S*, as aforesaid, and that the said *S*, held the said land and negroes, under the title of *W*, and with his concurrence and permission ; and that it is not necessary in law for the plaintiffs, in order to maintain this action, to prove an express contract with *S*, at the time *S*, first took possession, nor any express reservation of a certain rent,

nor the actual payment of any rent by *S*, to *W*, or to the administrators of *W*, since his death.

2. If the jury believe the several matters stated in the foregoing prayer, that the mere suing out a writ of replevin by *W*, against *Lurana S*, for the said negroes in April, 1818, which was afterwards discontinued by consent without costs of both parties, is not sufficient evidence in law, to establish an adverse possession of the said negroes, against *W*, under which the defendant can protect himself against this action.

3. That if the defendant relies upon the writ of replevin, and the proceedings in that case, to prove the adverse possession of *Mrs. Lurana S*, of the said property, the declarations and admissions of *Mrs. S*, while she was in possession, relative to the nature and character of her possession, or that she held by permission of *W*, are competent legal evidence for the plaintiffs to rebut such a defence, and to show if the jury believe such evidence, that she held and claimed under *W*.

The defendant by his counsel objected to said prayers, and prayed the Court to give the following instructions.

1. That if the jury believe from the evidence in this cause that the original plaintiff in this suit, on the 8th April, 1818, instituted an action of *ejectment* in *Anne Arundel* County Court, against the then tenant in possession, to recover the lands, for the use and occupation of which this suit is brought, that upon the death of said tenant in possession, *subpæna* was issued against *R L. S*, her devisee, who appeared in virtue of said *subpæna*, and was made a party to the suit, that the same was continued till October, 1822, when it was entered discontinued without costs by consent, then the plaintiffs are not entitled to recover in this action, for profits of said land pending the said suit.

2. If the jury are of opinion from the evidence, that on the 8th April, 1818, the plaintiff issued out a writ of replevin against *Lurana S*, executrix of *John S*, and

who possessed said negroes as executrix as aforesaid, to recover the negroes for the hire of which this action is brought,—that the said suit was continued till the death of *Lurana S.*, was suggested,—and who died without having closed her administration,—that *subpœna* issued against her executor, the defendant in this cause, who was administrator *d. b. n.* of *John S.*, who claimed the said negroes as administrator *d. b. n.* of *John S.*,—that the cause continued till October term, 1822, when it was entered, discontinued by consent without costs, then the plaintiffs are not entitled to recover in this suit for the hire of said negroes, during the time aforesaid.

The Court instructed the jury as prayed for by the plaintiff's counsel, and refused to give the instructions as prayed by the defendant's counsel, except so far as those are modified by the instructions already given. Whereupon to the instructions given, and to the refusal by the Court to instruct the jury as prayed by the defendant's counsel, the defendant excepted. And the verdict and judgment being against him, the present writ of error was sued out.

A question was made, and argued in the Court of Appeals, upon the manner in which the judgment was entered up in the County Court: The judgment was on verdict for \$1044 51, and the form pursued was as follows: "Therefore it is considered by the Court here, that the said *Rachel H.* and *Benjamin Watkins*, administrators as aforesaid, recover against the said *Joseph N. Stockett*, the sum of \$10,000 current money, (the damages laid in the nar) to be released on payment of \$1044 51, (the sum found by the jury) with interest, &c."

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

Magruder and *Alexander* for the appellant, contended, 1. That *John S.*, and wife, in the life-time of *John S.*, did not hold by permission and consent of appellee's intestate,

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and were not liable for use and occupation. 2. That after the death of *John S*, *Mrs. S*, the widow, entered as a trespasser. 3. That if *Mrs. S*, entered under the title of her husband, she was not liable for use and occupation. 4. That the nature of *Mrs. S*'s holding, was not changed by any acts or admissions subsequent to her entry. 5. That if the relation of landlord and tenant ever subsisted between *Mrs. S*, and *W*, it was terminated by the bringing of the ejectment, and replevin, by the latter against the former. 6. That *Richard L. S*, never was tenant to *W*, or held under his title. 7. That the appellant, by his entry, merely did not make himself tenant to *W*. 8. That the nature of the appellant's original holding was not changed, or affected by his acts or admissions afterwards. 9. That there is no evidence that appellant held as tenant pending the ejectment, but the contrary. 10. That there is no evidence to render *Mrs. S*, liable for the hire of negroes. 11. That appellant is not bound by the acts of *Mrs. S*, in relation to the negroes. 12. That the replevin against appellant is conclusive evidence of adverse holding. 13. That the judgment is erroneous. 14. That the claim is barred by limitations. They referred in their argument to the acts of 1809, *ch.* 153; 1811 *ch.* 161. *Fisher vs. State use of Johnson*, 1 *Harr. and Johns.* 416. *Tilghman vs. Stewart*, 4 *Harr. and M'Hen.* 163. *Purl vs. Duvall*, 5 *Harr. and Johns.* 69. *Riggen vs. Patapsco Co.* 7 *Harr. and Johns.* 294. 2 *Salk.* 515. *Cro. Jac.* 644. *Jackson vs. Aldrick*, 13 *Johns. Rep.* 106. *Birch vs. Wright*, 1 *Term. Rep.* 378. *Jackson vs. Fuller*, 4 *Johns.* 215. *Jackson vs. Tyler*, 2 *Johns. Rep.* 444. 2 *Wheat. Selw.* 1083, note (3.) 8 *Term. Rep.* 327. *Jackson vs. Deyo*, 3 *Johns. Rep.* 422. 2 *Johns. Ca.* 353. *Smith vs. Stewart*, 6 *Johns. Rep.* 46. *Bancroft vs. Wardell*, 13 *Johns.* 489. 2 *Taunt.* 145.

Johnson and Randall, for the appellees.

1. Judgments on verdict, should be entered up in the same way as by confession, 2 *Harr. Ent.* 87. 2. But if it

be error, it can be corrected in this Court under the act of 1809, because that act gives the Appellate Court the same powers in this respect which the County Courts have, and it is admitted that it might have been corrected in the County Court. 3. The deed of 1816, from *John S*, to *W*, estops *S*, from denying his title, and being in possession under that title, he is presumed to be, and treated as his tenant: It cannot be supposed, that he was in, adversely to the title which he had just created: a party in possession under a title, which he has himself created, is always considered as holding by permission of the grantee. 13 *Johns. Rep.* 106. 4. The evidence in the Chancery case, shows that as respects all the parties, (defendant included,) *W*, was admitted to be a mortgagee, and as such he was entitled to the rents. 2 *Johns. Rep.* 75. 2 *Sand. Ev.* 487. 5 *Barn. and Ald.* 604. 5. The admissions of *John and Lurana S*, are evidence against the present defendant, he being a privy with them in estate. 5 *Cowen.* 123, 128. 3 *Johns. Rep.* 499. 2 *Term. Rep.* 53. 6. The replevin only shows that the defendant was in the wrongful possession of the property at the time it was sued out, but that does not prevent the plaintiff from recovering on the implied contract for hire, because the *tort* may be waived, and a contract inferred, as respects the personal property. The case in 1 *Term. Rep.* 378, was for the use and occupation of real estate, and was decided on the statute of 11 *Geo.* 2. But if the *tort* could not be waived by the plaintiff alone, the discontinuance of the replevin with the consent of both parties, amounts to a waiver by both: if the replevin had gone on to a final decision, the judgment must have been for the plaintiff, according to the decision of this Court, and in that action the plaintiff would have recovered his claim in damages. There was an obligation then to pay the money, and where that is the case, the law will imply a promise. 1 *Cowp.* 290. 7. An action for use and occupation, and an ejectment may be brought at the same time. *Cowp.* 246. 2 *Camp.* 14. But in this case the ejectment was not de-

pending, at the institution of this suit, it having been discontinued in 1822. The case in 1 *Term. R.* 378, decides only that where the ejectment suit proceeds to *judgment*, the action for use and occupation cannot be maintained, because the judgment shows that plaintiff has not waived the *tort*. The case expressly decides, that but for the judgment, the action will lie for the entire possession. It is not denied that we are entitled to recover prior to the institution of the ejectment, and after its discontinuance. The prayer of the defendant below concedes this. If this be the case, it must be in virtue of a contract of some sort, and as the subsequent holding was the same as the prior, there must have been a prior contract to the same effect.

On the question of limitations, they referred to the case of *Oliver vs. Gray*, 1 *Harr. and Gill*, 204.

EARLE, J. delivered the opinion of the Court.

There were five exceptions taken on the trial of this case, which is an action for the use and occupation of land, and for the work, labor, and services of negroes, brought by the administrators of *Watkins* against *Stockett*. The *first* and *fourth* were filed by the plaintiffs, and were not used by them. The remaining three have had a full share of our attention. The *fifth* exception contains a recapitulation of all the evidence examined by either party. On this exception, three prayers were submitted by the plaintiffs, and two by the defendants, and all were decided favorably to the former. They will all be adverted to, in the opinion about to be pronounced by this Court. The plaintiffs repeated all the evidence adduced on their part, and asked the Court to instruct the jury, if they believed it, that it was sufficient evidence in law, to authorise them to infer the relation of landlord and tenant, as existing between *Watkins* and the defendant, during the possession of *Stockett*, and that *Stockett* held the land and negroes, under the title of *Watkins*, and with his concurrence and permission; and that it is not necessary in law, for the plain-

tiffs, in order to maintain this action, to prove an express contract with *Stockett*, at the time *Stockett* first took possession, nor any express reservation of a certain rent, nor the actual payment of any rent by *Stockett* to *Watkins*, or to the administrators of *Watkins*, since his death. The last part of this instruction is certainly correct. To maintain this action for use and occupation, it was not necessary for the plaintiffs to prove an express contract with the defendant at the time when he first took possession, nor an express reservation of a certain rent, nor that the defendant has paid rent to the plaintiffs, or their intestate. Such an action may be maintained on the implied undertaking, where the permissive holding is established; and if it appears in the evidence that a certain rent was reserved, the reservation may be used to regulate the *quantum* of damages. The former part of the instruction is of a different character, and exhibits to view the principal point in the cause. It informs the jury, that the evidence, as repeated by the plaintiff's prayer, is sufficient in law to authorise them to infer the relation of landlord and tenant, as existing between the parties, during the possession of the defendant, and that he held the land and negroes, under the title of *Watkins*, and with his concurrence and permission.

Every part of this evidence we have examined carefully, and we cannot perceive in any part of it, nor in the whole considered together, the presumptive quality ascribed to it. In a word, it does not appear to us sufficient in law, to justify the inference drawn from it by the County Court. In the fall of 1818, *Joseph N. Stockett* entered upon, and took possession of this land, and held it by himself and others, until the year 1825. By what authority, and in what character he possessed it, there is not a particle of direct testimony in the record to show. If he entered and possessed it as a trespasser, there is an end of this question. Out of this tortious proceeding no holding with permission can ever be inferred. If he came in as a trespasser, say the Court, in *Harwood vs. Cheeseman*, 3 Serg. and Rawl.

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the plaintiffs cannot recover in an action for use and occupation. And in 6 *Johns. Rep.* 49, it is said by the Court, that the purchaser who refused to perform his contract, changed himself into a trespasser, and in that character was liable to be turned out, and made responsible for mesne profits.

In January, 1819, *Joseph N. Stockett* united with *Richard Stockett* in reviving *Lurana Stockett's* bill in equity, against *Nicholas Watkins*, and although as her executor, and as administrator *de bonis non* of *John Stockett*, it was perhaps his duty so to do, to redeem the negroes transferred or pledged by the deed of 1816, he has nevertheless been considered as having taken her place in the contest, and succeeded to the possession of the land in her right.

We will take a short view of the subject in this light, and see whether it will conduct to a different conclusion than that already stated. Whatever the early impressions of *Lurana Stockett* might have been with respect to the rights of *Nicholas Watkins*, under the deed from her husband, in the month of April or May following his death, she filed the bill in Chancery against him, asserting the deed to be nothing more than a mortgage, which she offered herself ready to redeem, and denying positively the absolute rights which he claimed under it. The legal warfare by her thus commenced, was prosecuted with ardor by *Joseph N. Stockett*, until the year 1820, when he succeeded in obtaining from the Chancellor an interlocutory decree, pronouncing the deed in question to be a mortgage. With cheering prospects before him, he pressed the case on to a final decree, and in 1822 Chancellor JOHNSON also declared the deed of 1816 to be nothing more than a mortgage. By *Watkins*, the case was then taken to the Court of Appeals, where it was met by *Stockett* in the spirit such a struggle is calculated to inspire. He employed able counsel to defend the appeal, and continued unceasingly to assert that the land he possessed was pledged only, and not conveyed absolutely to *Nicholas Watkins*; and in this assertion he

persevered, until undeceived by the Court of Appeals, in 1825. What ground is furnished by all this, it may be asked, on which to raise a legal inference that *Joseph N. Stockett* held the land and negroes all the time he possessed them, under the title of *Nicholas Watkins*, and with his concurrence and permission. They are not facts and circumstances which usually attend such permissive holding, and this is the best test, it is said, by which to try a legal presumption. They rather appear to us of an opposite character, and to manifest the actual posture of *Joseph N. Stockett*, to have been inconsistent with the supposed tenancy to *Nicholas Watkins*. His equity proceeding had assumed for him the attitude of a mortgagor offering to redeem the mortgaged premises; and he maintained himself in it until the close of the controversy, and in this situation constantly held the disputed property. How then is it possible, in the teeth of this fact, to infer the relation of landlord and tenant between him and *Nicholas Watkins*, during the same period, and that he enjoyed by his permission? The law sometimes implies contracts, but never where there is an express contract, or facts exist wholly inconsistent with the contract to be implied. But it has been thought that the Court's instruction on the first prayer, is supported by the disclosures made by *Joseph N. Stockett* to *James Davidson* and *John Beard*, a little before, and after, the reversal of the decree in the Court of Appeals. We will briefly advert to them, to show their inadequacy for this purpose. When *Joseph N. Stockett* was about to lease to *James Davidson*, early in the year 1825, he said to him that the rent would have to be paid to him or *Nicholas Watkins*, as the case between them eventuated in the Court of Appeals, at the next June Term, when it was expected to be finally decided. By this he said nothing more than to repeat the disposition the law would make of the accruing rent, in the event of the success of *Nicholas Watkins*: for it is exceedingly clear, that the tenant at the end of the year could not safely pay to any, except the established owner of the land. It bears

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but little on the subject under review, having no tendency, that we can perceive, to aid the presumption that the relation of landlord and tenant existed between *Nicholas Watkins* and *Joseph N. Stockett*, during the pendency of their suit in equity, and in the Court of Appeals. The disclosure to *John Beard* is pretty much of the same cast, and appears to us to have little to say to the point before us. It took place in October, 1825, at which time *Joseph N. Stockett* refused to abate the hire of negro *Sam*, and said he had to pay it to *Nicholas Watkins*, and that all the rents of the place, and the hire of the negroes, were to be paid to him, as the suit between them was determined. The event of the suit had rendered him accountable to *Nicholas Watkins* for the hire of the negroes, and the rents of the land, and there is to be recognized in what he said nothing more or less than an acknowledgment of his accountability to him. It affords no foundation on which to raise an inference that he was to be answerable for those demands in any particular form of proceeding, and not the slightest to justify a presumption that he held from *Nicholas Watkins* permissively from 1818 to 1825, to which holding there is not the smallest allusion. His liability he spoke of in general terms, and it would be a most strained and forced construction of his language, to deduce from it a permissive occupation by him of these premises, which his conduct, for a series of years together, flatly contradicts.

To these sentiments of the Court, in relation to the instructions on the first prayer of the plaintiffs, the opinion of the County Court is opposed, on the first prayer submitted by the defendant. They refused on this prayer to direct the jury, that the plaintiffs were not entitled to recover in this action for the profits of the land, pending the ejectment instituted by *Nicholas Watkins* against *Laurana Stockett* in 1818, and discontinued in 1822; maintaining, as they did, the converse proposition, that the action was sustainable for the profits during the same period. This refusal of the Court below, we must then necessarily disapprove of, and

we will add no other remark upon this part of the subject. The two other prayers on behalf of the plaintiffs, as well as the last offered by the defendant, refer to the negro property, and will be disposed of by us in a few words. They rest upon different principles, and we entirely concur, with the Court, that the action as to the work and labor of the servants may be sustained. Supposing *Joseph N. Stockett* to have possessed them as a trespasser from the first to the last of the tedious law suit, between him and *Nicholas Watkins*, the tort may be waived, and the action of *assumpsit* supported. This right to waive the direct injury, and adopt *assumpsit*, is universal, where the chattel taken, has been turned into money. And it has been sustained in some instances, where the chattel has not been parted from by the trespasser. For the distinctions on this subject, *vid. Haubly vs. Trott, Cowp. 375*. The present case however differs in its facts from most of the cases decided on this head. The negroes have been restored to *Nicholas Watkins*, and the claim is for damages for the tort, committed by the trespasser in seising them, and detaining them from the owner. That this kind of tort may also be waived, and an action substituted for it, on the implied contract, is fully established by the modern authorities, and is in fact in principle like the old cases reported on this doctrine. *Lightly vs. Coulston, 1 Taunt. 112, and Foster vs. Stewart, 3 Maul. and Selw. 197*, may be consulted, and they will be found decisive on the point. The last was the case of an apprentice, seduced from the service of his master, where the seduction was waived, and an *assumpsit* for the work and labor of the apprentice, supported by *Ld. Ellenborough*, and the whole Court.

With a few words on the *second* and *third* exceptions taken by the defendant, we will close this opinion. We cannot think with the Court below, that the admissions of *Lurana Stockett*, as to the terms on which she held the negroes, that belonged to her husband's estate, were competent evidence against the defendant. He avowedly possessed them,

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as administrator *de bonis non*, of *John Stockett*, and in fact was a trespasser on the rights of *Nicholas Watkins*, and in neither character could he be prejudiced by the confessions of *Lurana Stockett*. It is true they were bequeathed by her husband to her, but if they had been proved her property, they nevertheless were subject to the testator's debts in his hands.

The *third* exception relates to the act of limitations, and we are of opinion that no part of the plaintiff's demand is barred by time, if, in other respects, the action for it was sustainable. About the period of issuing out the writ, the defendant made acknowledgments to the witness, *John Beard*, that are amply sufficient to revive the remedy, and prevent the operation of the statute, on that portion of the account which had been standing for more than three years.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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D gave a note to W for his accommodation, who endorsed it to S, for the full value. At the time S advanced the money, R was present and pledged his word to S, that if the note was not paid at maturity he would pay it. The note not being paid, S brought suit against D; pending the suit R made S several payments on account of the note, and at the last payment received from S a receipt, concluding as follows: "which is in full of a note held by me against D, now in suit, and proceeds of the same properly belonging to said R." A few days before the trial of the cause and some months after the last payment, the suit was entered on the docket for the use of R. It appeared that R was entitled to the beneficial interest in the note, and that S had no other interest than what arose from an obligation to prosecute the suit to final judgment for R's use. HELD: that as the payment to S was not made by D, or on his behalf, that the suit could be carried on for R's benefit as the equitable assignee.

A promissory note may be purchased without taking an endorsement as well after, as before suit brought. The purchaser has the beneficial, and the vendor the legal interest; and the suit may be carried on without entering the use.

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APPEAL from *Baltimore County Court.*

This was an action of *Assumpsit*, by the appellees, the endorsees, against the appellant, the drawer of a promissory note, for \$2500, payable to *Wilson, Williamson & Co.* and by them endorsed to the plaintiffs. The action was commenced on the 23d of March, 1826. The defendant pleaded *non assumpsit*.

1. At the trial the plaintiffs offered in evidence the promissory note, on which the suit is brought, with the endorsement thereon, and which was admitted to have been executed by the parties whose names are on the same; to wit, “\$2500. *Baltimore*, December 26th, 1825. Seventy days after date, I promise to pay *Wilson, Williamson & Co.* or order, twenty-five hundred dollars, and — cents, for value received. *D. Williamson.*” (Endorsed,) “Pay the contents to Messrs. *S. & M. Allen & Co., Wilson, Williamson & Co.—S. & M. Allen & Co.*” The defendant then read in evidence to the jury the following bill on the equity side of this Court, and all the proceedings thereon, with the answer of *Sylvester L. Fowler*, one of the plaintiffs, and the exhibits filed with the said answer. “To the Honorable the Judges of *Baltimore county Court*, sitting as a Court of Equity: Humbly, &c. your orator, *David Williamson*, of the city of *Baltimore*, says, that some time in the month of December, 1825, a certain *John B. Wilson, Charles A. Williamson and John N. Woodard*, of the city of *Baltimore*, were trading under the firm of *Wilson, Williamson & Co.* and the said *Charles A. W.* being the son of your orator, and then being confined to his lodgings by indisposition, the said *John B. W.* applied to your orator for his aid, in raising funds for the use of the firm; falsely representing that the said firm was doing a good business, and only wanted funds to enable them to carry it on advantageously. And your orator further sheweth, that relying upon the said representations, your orator agreed to loan, and did loan to the said *John B. W.* for and on account of the said firm, his promissory

note in their favor, bearing date at *Baltimore*, the 26th of December, 1825, payable 70 days after date, for the sum of \$2500, for the purpose of raising money. And your orator further sheweth, that he has heard and believes it to be true, that the said *John B. W.* immediately thereafter, endorsed the said note in the name of the said firm, and transferred it to a certain *George Riston*, (he the said *George R.* knowing how the said note had been obtained) at usurious interest; that the said *George R.* shortly thereafter, passed the said note to *Solomon Allen*, *Moses Allen* and *Sylvester Fowler*, of the city of *Baltimore*, (then trading under the firm of *S. & M. Allen & Co.*) but that the said *George R.* did not endorse the same, the endorsement of the said *W. W. & Co.* being, as your orator has been informed and believes, in blank. And your orator further sheweth, that the said note not being paid when it arrived at maturity, the said *Solomon*, *Moses*, and *Sylvester*, instituted a suit thereon against your orator, which is now here depending, and to the proceedings wherein your orator begs leave to refer, and prays that the same may be taken and considered as a part of this, his bill. Your orator further sheweth, that he hath understood and believes that the said *Solomon*, *Moses* and *Sylvester*, are not in fact the holders of the said note, and have no interest therein; but that the said suit 'is intended for the benefit of the said *George R.* and is prosecuted for and on his account, by the said plaintiffs. And that the said *Solomon*, *Moses* and *Sylvester*, have no right of action whatever against your orator; all which actings and doings are contrary, &c. In tender consideration whereof, and for as much, &c. as he is unable to prove, &c. To the end therefore, that the said *Solomon*, *Moses* and *Sylvester*, may true answers make to the matters herein charged; and that in as full a manner as if, &c. and especially whether the said *Solomon*, *Moses* and *Sylvester*, did not receive the said note from the said *George R.*? and if they did not receive the said note from *George R.* from

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whom did they receive the same? and on what account? and for whose use the same was received? and whether they paid value for the said note, and to whom and for whose use, and on whose account the said suit is carried on? and whether they, the said *Solomon*, *Moses* and *Sylvester*, have any and what interest in the said note? And that they may be required to produce the said note, and that the same may be cancelled and destroyed, and that your orator may have such other, and further relief, &c. Whereupon the said *Sylvester Fowler* filed in the County Court the following answer: The answer of *Sylvester F.* one of the defendants to the bill of complaint of *David W.* exhibited to the judges of Baltimore County Court, sitting, &c. against *Solomon A.*, *Moses A.* and *Sylvester F.* This defendant saving to himself, &c. says, that *Solomon A.* and *Moses A.* have no knowledge of the transaction to which the bill refers, as they were in *Philadelphia* at the time it took place, and have resided there ever since; the transaction was with this defendant alone, and he alone can testify respecting it. This defendant has no knowledge of the representations made by *John B. W.* to the complainant at the time the note was given, and cannot therefore either admit or deny the truth of the representations, as set forth in the bill. This defendant further states, that the firm of *S. & M. Allen & Co.* advanced out of their own funds, to *W. W. & Co.* the endorsers of the said note, the full amount of the note in money, without receiving or retaining interest, at the rate of more than six per cent. per annum; that the transaction was with the defendant, and so far as he has any knowledge of it, was not usurious, either in fact or intention, but was on the contrary perfectly fair and legal. This defendant further states, that the suit at law referred to in the bill was commenced against the maker and endorsers of the said note, by *Solomon A.*, *Moses A.* and *Sylvester F.* on their own account, and for their own benefit. And lastly, this defendant again utterly denies the charge of usury, set forth in the bill of the complainant.

Upon exceptions being filed to the preceding answer, the same respondent put in the following additional answer: To the first exception this defendant says, that to the best of his recollection, *George R.* was present with *John B. W.* when this defendant received the note, but the note was received from the said *J. B. W.* and not from the said *George R.* To the second exception this defendant says, that he received the note from the endorsers, *W. W. & Co.* as stated above. To the third exception this defendant says, that he received the said note on account and for the sole use of *S. & M. Allen & Co.* the plaintiffs in the action at law. To the fourth exception this defendant says, that he paid value for the note as stated in his original answer to *W. W. & Co.* the endorsers on the said note. To the fifth exception this defendant says, that at the time he advanced the money to *W. W. & Co.*, *George R.* was present, and pledged his word to the defendant, that if the said note was not paid at maturity, by the maker or endorser, he, the said *George*, would pay it. Since the suit at law was commenced, the said *George R.* has redeemed his pledge and paid the note, as appears by the following receipt herewith filed, marked A; upon this consideration the said *George R.* is now entitled to the beneficial interest in the said note and suit. This defendant further says, that if he had supposed it material, he should have stated this fact in his original answer. To the sixth exception this defendant says, that the plaintiffs in the action at law, have no other interest in the note, than what arises from an obligation to prosecute the suit to final judgment for the use and benefit of the said *George R.* To the seventh exception this defendant saith, that he herewith files the note and prays that it may be deemed as part of this, his answer.

The exhibit marked A, referred to in the foregoing answer, is as follows, to wit: "We acknowledge the receipt from *George Riston*, of the following items, viz. on the 18th November, 1826, cash, \$586 57; on the 18th December, 1826, cash, \$517 16; on the 20th January, 1827, cash,

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\$502 83; on the 19th February, 1827, cash, \$1028 02; making in all \$2634 58, which is in full of a note held by us against *D. Williamson*, for \$2500, which note is now in suit and the proceeds of the same properly belonging to said *Riston*. Baltimore, 19th February, 1827. *S. & M. Allen & Co.*” And the defendant further gave in evidence by the notary public, by whom payment of the said note was demanded, at the instance of the legal plaintiffs, of the defendant, *David Williamson*, that when he applied to the defendant for the payment of the same, the said defendant refused to pay the same, alleging as a reason the following: “that the said note can or will not be paid, having been obtained by false representations, pretexts, and devices, and not applied to the purposes for which it was given or intended to be used; and furthermore, because usury has been had and received thereon.” And the defendant further gave in evidence that this suit was not entered for the use of *George Riston*, the person named in the said equity proceedings, until the 25th day of this present month, November, 1827, and after the coming in of the answers in the said equity proceedings mentioned. And further gave in evidence the following receipt, admitted to have been signed by *Wilson, Williamson & Co.* the payees on the promissory note aforesaid, at the time the note mentioned in the same was delivered by defendant to them.

“*Baltimore*, December 26th, 1825. Received of Mr. *D. Williamson*, one note dated 23d instant, 60 days, \$2,500
 26th “ 70 “ 2,500

Which we promise to pay at maturity. \$5,000
 \$5,000. *Wilson, Williamson, & Co.*”

And further gave in evidence, that one of the notes stated in said receipt is the note in suit in this cause. Whereupon the defendant, by his counsel, prayed the Court to instruct the jury as follows: *First*. That the plaintiffs are not entitled to recover upon the foregoing evidence if the jury believe the same; because it appears from such evi-

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dence that said plaintiffs have been paid and satisfied the full amount of principal and interest due upon the promissory note, upon which the action is brought, and have no interest therein, and that said note is therefore extinguished. *Second.* That also upon said evidence, if the jury believe from the same, that the principal and interest of the note upon which the action is brought, and offered in evidence by plaintiffs, has been paid to the plaintiffs since the institution of the action; that then the plaintiffs are only entitled to recover nominal damages; both of which instructions the Court [ARCHER, Ch. J., and KELL, A. J.] refused to give, being of opinion that the defendant had adduced no evidence to shew, that any payment had been made to the plaintiffs by the defendant, or by his agent; but that the sum received by the plaintiffs from said *Riston*, must be considered as a consideration paid by him to the plaintiffs for an equitable assignment of the plaintiffs legal interest in the cause of action.

The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and STEPHEN, J.

Scott, for the appellant, contended,

1. That there was evidence offered on the part of the defendant to go to the jury, for the purpose of showing, that at the time of the trial, the note upon which the action is brought had been paid, and that the plaintiffs at that time had no interest therein. 2. That upon the evidence the plaintiffs, if entitled to recover at all, were only entitled to nominal damages. 3. That the payment of the note by *Riston*, extinguished all right of action thereon. 4. That the plaintiffs having been paid the amount of their claim by *Riston*, voluntarily, and without the request or assent of the defendant, that *Riston* could not by that payment entitle himself to have the suit prosecuted for his use. He refer-

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red to *Smith vs. Pickering*, 6 *Esp. Rep.* 50. *Holland vs. Jourdine*, 1 *Holt.* 6. 3 *Serg. and Low.* 5. The act of 1763, ch. 23, sec. 7. *Brown vs. Davis*, 3 *Term. Rep.* 83. *Baily on Bills*, 118, 454. *Brown vs. Turner*, 7 *Term. Rep.* 630. *Tinson vs. Francis*, 1 *Camp.* 19. *Onion vs. Paul.* 1 *Harr. and Johns.* 114. *Norwood vs. Norwood*, 2 *Harr. and Johns.* 238. *Allstan vs. Contée*, 4 *Harr. and Johns.* 351. *Morgan vs. Reintzell*, 7 *Cranch.* 273. *Heighe vs. Farmers' Bank*, 5 *Harr. and Johns.* 68. *Barger vs. Collings*, 7 *Harr. and Johns.* 213. *Owings vs. Owings*, 1 *Harr. and Gill.* 484. *Hollingsworth vs. Floyd*, 2 *Harr. and Gill*, 87. *McEvers vs. Mason*, 10 *Johns. Rep.* 224.

Meredith and *J. Raymond*, for the appellees.

1. The money paid to the appellees, *Allen & Co.* was not paid by the appellant, but by a stranger, and this circumstance distinguishes the case from all the cases referred to by the appellant's counsel. It was not paid at the instance and request of the appellant, or with a view to extinguish the debt, nor was it so received by the *Allens*. Under such circumstances the payment is never regarded as extinguishing the debt. *Merryman vs. State*, 5 *Harr. and Johns.* 424. *Gray vs. Wood*, 2 *Harr. and Johns.* 328. *Mechanics' Bank vs. Hazard*, 13 *Johns. Rep.* 354.

2. The payment by *Riston* operated as an equitable assignment of the suit to him. If the payment does not operate as an assignment, the remedy of the party paying is gone: he cannot sue for money paid, because he could not make himself the creditor of *Williamson* without his consent, and the money was paid voluntarily.

3. The defendant is not in a worse condition than before the assignment. If the want of consideration between himself and the payees, could have been taken advantage of before the entry for the use of *Riston*, it could afterwards. This point however is not before this Court, not having been raised below.

Williamson vs. Allen, *et. al.* use Riston.—1839.

4. A party receiving a note does not take it subject to the equities existing between all the preceding parties. He stands in the shoes of his assignor, and no defence can be made against him, which would not have been good against his assignor.

They referred to *Gray vs. Wood*, 2 *Harr. and Johns.* 328. *Ringgold vs. Tyson*, 3 *Harr. and Johns.* 178. *Hudson vs. Goodwin*, 5 *Harr. and Johns.* 115. *Day vs. Lyon*, 6 *Harr. and Johns.* 140. *Kiersted vs. Rogers and Garland*, *Id.* 285. 13 *Johns. Rep.* 354, 357. *Holland vs. Jourdine*, 3 *Serg. and Lowb.* 5, 6. *Brown vs. Davis*, 3 *Term.* 83. *Heighe vs. Farmers' Bank*, 5 *Harr. and Johns.* 68. *Hollingsworth vs. Floyd*, 2 *Harr. and Gill*, 87.

Taney, (Att'y Genl.) in reply.

1. *Riston* is no party to the note, either as drawer or endorser, and can claim no privileges as such. Being an accommodation note, the drawer is to be considered as the security, and the payees as the principal debtors: the direction by the Court, that the payment by *Riston*, was a consideration for the assignment of the legal interest of *Allen & Co.* was deciding a question of fact, as it depended upon the intention with which the payment was made. It cannot be said that there was no evidence to show that his intention might have been to extinguish the debt. The fact that a term intervened between the payment and endorsement to his use, was evidence either that he designed to extinguish the note, or that he paid it, as security for the actual borrowers, *Wilson, Williamson & Co.* and in either case he had no right to sue. *Mechanics' Bank vs. Hazard*, 13 *Johns. Rep.* 356. If he paid, as security for the payees, who are the principal debtors, he stands in their shoes, and as they could not sue, he cannot. 2. The payment was made before *Riston* became a party to the suit, and by it the claim was extinguished, or reduced to nominal damages. The subsequent endorsement to his use, could not revive it.

Williamson vs. Allen, *et al.* use Riston.—1830.

BUCHANAN, Ch. J., delivered the opinion of the Court.

The promissory note on which the suit was brought, was drawn by the appellant, *David Williamson*, in favor of *Wilson Williamson, & Co.* and by them endorsed to the appellees, *S. & M. Allen, & Co.* The note appears to have been drawn for the accommodation of *Wilson, Williamson, & Co.* and to enable them to raise money upon it. At the time of the endorsement by *Wilson, Williamson & Co.* the endorsees, *S. & M. Allen, & Co.* the appellees, advanced to them the full amount of the note, which not being paid at maturity, they brought suit against the drawer, which was entered on the docket for the use of *George Riston*. When *S. & M. Allen, & Co.* advanced the money on the note to *Wilson, Williamson & Co.* *George Riston* was present, and pledged his word to them, that if the note was not paid at maturity, by the maker, or endorsers, he would pay it; and did after the institution of the suit, pay to them the amount of the note. The entry on the docket, "for the use of *George Riston*," was made on the 25th of November, 1827, only three or four days before the trial. The amount so paid by *Riston*; was in different sums, and at different times, the receipt given to him for which, by *S. & M. Allen, & Co.* is dated the 19th of February, 1827, when the last was paid, and concludes in these words, (after stating the different sums paid,) "which is in full of a note, held by us against *D. Williamson*, for \$2500, which note is now in suit, and the proceeds of the same properly belonging to said *Riston*." And in an answer by *Fowler*, one of the firm of *S. & M. Allen, & Co.* to a bill of discovery filed pending the suit at law, by *David Williamson*, it is alleged that in consideration of the payment by *Riston*, "he is now entitled to the beneficial interest in the note," and that *S. & M. Allen, & Co.* have no other interest in the note, than what arises from an obligation to prosecute the suit to final judgment for his use and benefit. This answer and receipt, which is made an exhibit and referred to in the answer, were offered in evidence by *David*

Williamson, the appellant, and furnished the only evidence in the case relating to the payment by *Riston*, and the interest he acquired in the note.

In this state of facts it is contended, that the note and the interest of *S. & M. Allen, & Co.* the appellees, therein, were extinguished by the payment to them of the amount, and that he was not entitled to recover, or if entitled at all, that he was not entitled to recover more than nominal damages. Admitting that if the whole amount of the principal and interest of the note, was paid to the appellees by the appellant, or by *Riston*, for, and on his account, and as his agent after the bringing of the action, they were not entitled to recover more than nominal damages; yet there is nothing appearing in the record, that would have justified the Court, in instructing the jury either, that the appellees were not entitled to recover, or that they were only entitled to recover nominal damages, as was prayed at the trial, and is insisted on here; which would have been to assume the fact, that the payment was by the appellant, or by *Riston*, as his agent in discharge of the note. For if the payment was not made by him, or his agent in discharge of the note, or with that intention, it does not necessarily follow, that it was thereby extinguished. *Riston* or any body else might have purchased it, without taking an endorsement by the appellees, as well after as before suit brought, which is not understood to be denied; and thus have acquired the beneficial interest, whilst the legal title remained in the appellees. And if *Riston* did purchase it, or advance the money upon it, not on account of, or as the agent of the appellants, and for the purpose of discharging it; but on his own account, and with the intention of acquiring the beneficial interest, and suffering the legal title to remain in the appellees, for the purpose of carrying on the suit, which he had a right to do, the note was not thereby extinguished, but remained in force, and no injury was done to appellant, who was not thereby deprived of any defence, that he would have had against the appellees, if no such

transaction had taken place, and they had gone on to trial, as the legal and equitable holders. If *Riston* had purchased the note, or the beneficial interest therein, before the institution of the suit, but after it had reached maturity, without taking an endorsement, he could not have sued in his own name, but in the name only of the appellees, in whom the legal title remained for his use, subject to all the equities of the appellant, as against the appellees. And in this respect it makes no difference, when the purchase is made, whether before or after the bringing of the suit, the rights of the defendant being no more affected in the one case than the other. In the case of a purchase before suit brought, the entry for the use of the purchaser, if made at all, (which is not necessary for the purpose of carrying on the suit,) may as well be made at any time after, as at the time of bringing the suit, and it is as difficult to perceive why such purchase may not be made as well after, as before a suit is brought. For the principle here assumed, that the purchase of a promissory note, or the payment of the amount to the holder, not by the maker, nor on his account, nor with the intention to discharge it, but with a view of acquiring the beneficial interest in it, does not extinguish the note, whether made before, or after suit brought, but if made before and without endorsement, that suit may be brought in the name of him, in whom the legal title remains, for the use of him, who has thus acquired the beneficial interest, or if after suit brought, that the suit may be carried on in the name of the original plaintiff, for his use, and that the defendant can take no advantage of it, it is quite sufficient to refer only to *Gray and Biddle, vs. Wood and Wife*, 2 *Harr. and Johns.* 328. *Mechanics Bank vs. Hazard*, 13 *Johns. Rep.* 353. And *Merryman vs. The State*, 5 *Harr. and Johns.* 423. The circumstance urged in the argument that *Riston* was present, when the note was endorsed to the appellees, and said if it was not paid at maturity, by the maker or endorsers, he would pay it, can have no influence upon the decision of this cause. That

pledge, if it can be so called, was made, for any thing appearing in the record, without consideration, and placed him under no obligation to pay it. The money then was not paid by the appellant; and if it was not paid by *Riston* on his account, or as his agent, nor with the intention to discharge the note, but with a view of acquiring the beneficial interest himself and that the suit should be prosecuted for his use, there is no pretence that the appellees were not entitled to recover, or only entitled to recover nominal damages, though only nominal parties, and *Riston* the real party in interest to the suit.

Is there then any thing in the record to show, or from which a jury could infer, that it was paid by *Riston*, on the appellant's account, or as his agent, with a view to discharge the note, and not with the intention to acquire the beneficial interest himself? To say nothing of the evidence furnished by the answer of *Fowler*, one of the appellees, to the bill of discovery by the appellant, "that *Riston*, by paying the amount of the note, had entitled himself to the beneficial interest of it," and that the appellees "had no other interest in the note, than what arose from an obligation, to prosecute the suit to final judgment, for his use and benefit," the receipt of the appellees to *Riston* for the amount paid by him, which, with the answer of *Fowler*, is the only evidence in the cause, in relation to that subject, and that too produced by the appellant himself, speaks a language not to be misunderstood. It is this "in full of a note held by us against *D. Williamson* for \$2500, which note is now in suit, and the proceeds of the same properly belonging to said *Riston*." The proceeds of the note could not have belonged to *Riston*, unless he had acquired the beneficial interest in it; and if he paid the money to the appellees, for and on account of the appellant, and with the intention to discharge the note, it would thereby have been extinguished, and he neither could nor intend to have acquired any beneficial interest in it. The proceeds then of the note, could only properly have belonged to *Riston*, as stated in the receipt, on the

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ground that he paid the money, not for the appellant, or as his agent, but on his own account, and thereby entitled himself to the beneficial interest in the note, with the right to pursue it in the name of the appellees.

Thus it appears from the appellant's own showing, that the payment of the money was not made by him, nor by his agent in his behalf. He therefore could not in any manner avail himself of it.

JUDGMENT AFFIRMED.

KALKMAN vs. CAUSTEN—June, 1830.

K, whose vessel had been, with others, sunk in the harbor of B, in 1814, for its protection from the public enemy, in February, 1821, wrote to C, that "it would be a source of gratification to me, if your exertions are crowned with that success they so justly merit, and I rest assured, that you will interest yourself equally as much for the T's (the name of K's vessel) business, as that of the other vessels entrusted to your management. "C attended to the claim of the owners of the sunken vessels upon the government for indemnity; and on the 5th March, 1823, K enclosed him an order, (without date) on the Secretary of the Treasury, requesting him to pay C, out of the allowance for K's claim, which had been retained at the Treasury on K's account, a certain sum, being C's proportion of said retained money, as stipulated to be paid him for his services and expenses in collecting the proofs relating to the application of the said vessel to the public defence." It appeared that in 1817, K had been discharged from his contracts under the Insolvent Laws of *Maryland*, and in December, 1821, his trustee agreed to allow C a commission for prosecuting the claim of indemnity for K's vessel, in the event of his succeeding, provided the Court would permit the trustee so to do. The whole allowance was, however, retained by the government, and passed to the credit of K's bonds, for duties then unpaid. In an action by C against K, to recover compensation for his services aforesaid: HELD, there was evidence for the jury to find a contract between C and K, and they might as fairly infer that it was entered into a little anterior to the letter of 1821, as before the insolvency of 1817—and that if the plaintiff was to be paid out of the sum to be allowed on account of the vessels, yet if he had been deprived of it by the defendant's means, the defendant was personally liable—that the United States under the circumstances being authorised to retain the allowance in payment of the defendant's bonds, their claim being a just one, and the plaintiff having no lien on the fund in the Treasury, the defendant still remained liable.

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APPEAL from *Baltimore County Court*. *Assumpsit* by the appellee, *James H. Causten*, against *Charles F. Kalkman*, the appellant, commenced on the 2d day of July, 1825.

The declaration contained counts for work and labor, goods, wares, and merchandise, the money counts, and an *insimul computassent*; and also two special counts, under which no evidence was offered by the plaintiff.

The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos* and *actio non accrevit*, &c. General replications and issues joined.

1. The plaintiff to support the issue on his part, offered evidence, that in the year 1814, a number of vessels were sunk at *Fort M'Henry*, for the defence of the city of *Baltimore*; that among them was the ship *Temperance*, owned by the defendant, and to shew the amount of the allowance made by the *United States* in favor of the defendant, he read in evidence the following letters and orders: "*Baltimore*, February 7th, 1821—*Washington City*, *Jas. H. Causten*, Esq. Dear Sir: I am very thankful for the information you had the goodness in communicating on the 3d inst. (which only got to hand yesterday)—it will be a source of sincere gratification to me, if your exertions are crowned with that success which they so justly merit, and I rest assured that you will interest yourself equally as much for the *Temperance's* business, as that of the other vessels entrusted to your good management. When *Mr. Williams* comes thoroughly to know the situation of the ship owners, whose vessels were one of the principal causes of saving *Baltimore*, that gentleman will, no doubt, throw no impediments in the way of recovering what is so justly and so long since due. *Chas. Fredk. Kalkman.*"

"The honorable *William H. Crawford*, Secretary of the Treasury—Sir: Please pay to *Mr. James H. Causten*, (out of the money retained at the Treasury for my account, say \$1995 62, being the allowance awarded to me by the Secretary of the Navy, for the detention of my ship *Temperance*, under the act of 26th April, 1822, 'An act for

the relief of sundry citizens of *Baltimore*’) the sum of \$399 12; the same being his proportion of said retained money, as stipulated to be paid to him for his services and expenses in collecting the proofs relating to the application of said vessel to the public defence; representing the merits of the case before Congress, which obtained the passage of said law, and liquidating the ratio of compensation due to said vessel, under said law; before the Secretary of the Navy and the first Comptroller of the Treasury. With much respect, I am, sir, your most obedient servant, *Chas. Fredk. Kalkman.*”

“*Baltimore*, March 5th, 1823. Dear Sir: In conformity to your wish, I now enclose, (signed by me,) the letter for the Honorable the Secretary of the Treasury, also a letter addressed to *Mr. John J. Thompson*, on the *Temperance’s* business. The papers in question, I have not been able to lay my hands on, but left such instructions at home, as will, in all likelihood, procure them. If in a little while hence, you will please call on *Mrs. Kalkman*, for that purpose, they may, with your friendly assistance, probably be found. Be assured, my dear sir, that you have my warmest wishes for your success, as to the ~~irksome~~ and intricate business still in suspense at *Washington*; not for my sake do I wish this, but on your own account, because the sacrifices which you have already made, and are still ready to make, richly entitle you thereto. *Chas. Fredk. Kalkman.*” *Jas. H. Causten, Esq.*”

And further, the plaintiff gave in evidence that the said *Causten* had labored diligently, as agent of said owners of ships, and that the allowance awarded by the United States, was owing to the plaintiff’s exertions in procuring testimony relative to said claim, &c. and further proved, the value of said services was equal to 20 per cent. on the amount allowed by government. The defendant, to support the issue on his part, proved that the defendant, on the 18th of September, 1817, applied for the benefit of the Insolvent Laws of *Maryland*, and was under said laws duly released; that upon

his said application, *Elias Glenn* was appointed trustee, for the benefit of said *Kalkman's* creditors, and he further offered to prove, that the said trustee entered into a contract with the said *Causten*, touching indemnification for said ship *Temperance*, which is as follows: "*Baltimore*, 12th December, 1821. *Mr. James H. Causten*. Sir: As you have undertaken to go to *Washington* this winter, to attend Congress on the subject of our petition before that honorable body, respecting the claim we have preferred, for unsatisfied damages and losses, sustained by our vessels sunk at the entrance of this harbor in the month of September, 1814, under the requisition of the commander in chief General *Samuel Smith*, whereby this important post, including *Fort M'Henry*, was saved from destruction, by the impediment which they presented to the passage of the enemies ships of war. We therefore hereby constitute you our agent for the above purpose, and request you will pay the necessary attention thereto; and in the event of your succeeding in obtaining the passage of a bill for our indemnity, we agree to allow you at the rate of twenty per cent. on whatever sum or sums we may receive, and which, through your agency and attention, may be authorised by law of Congress, to be paid to us respectively, whether it be by reference to the Secretary of the Navy or War, or other departments of the government. In the course of your stay at *Washington*, you will please to communicate occasionally with any one of us for the information of the whole, as well as for our government, in case we should deem it requisite to instruct you further on the subject. *Henry Payson & Co.* Attorneys of *Obed Mitchell*, owner of ship *Mars*, &c."

"I agree, as trustee of *Chas. F. Kalkman*, to allow the above commission, provided the Court will permit me to do so. *K* was the owner of ship *Temperance*. *Elias Glenn*, trustee of *Kalkman*, December 12th, 1821." "*John Brice*, trustee of *J. H. Causten*," and further proved that, upon *Causten's* application to said trustee, he referred him to *Kalkman* for information, and the correspondence on the

subject of indemnification for said ship *Temperance*, the said trustee having no knowledge of the claim. The plaintiff further proved by *Doctor M'Culloh*, Deputy Collector of the port of *Baltimore*, that by order of the government, the sum of \$1995 62 was, after the said allowance to the owners of said vessel the *Temperance*, passed to the credit of said defendant, on certain custom house bonds given by said defendant, to the United States. Thereupon the defendant prayed of the Court the following directions to the jury.

First. That the plaintiff has adduced no evidence of any undertaking between him and the defendant, touching services for indemnification for the ship *Temperance*; by which the said *Kalkman* is liable to the said *Causten*, and that the plaintiff therefore is not entitled to recover.

Second. That if the jury shall believe, that the contract, if any existed between the plaintiff and defendant, was, that the plaintiff should receive his compensation, if any, out of the funds which should be awarded by the United States in favor of the ship *Temperance*, and that no part of said fund ever came to the hands, or was at the disposal of said defendant, or his trustee aforesaid, *Elias Glenn*, and that said *Kalkman* directed the Secretary of the Treasury of the United States, to pay the said *Causten* the said compensation, by an order received by the said *Causten*, from said *Kalkman*, upon the said Secretary, then the plaintiff is not entitled to recover.

Third. That if the jury shall find that the contract between *Causten* and *Kalkman*, (if any such shall be found by the jury to have been made) was made before said *Kalkman's* application for the benefit of the insolvent laws of *Maryland*; then the said *Kalkman* was by his release under the said laws, discharged from said contract, and the plaintiff is not entitled to recover, except subject to said release, and the provisions of said insolvent laws. Which directions, as prayed in the *first* and *second* prayers, the Court (ARCHER C. J. HANSON and KELL, A. J.) refused to give, but gave the direction prayed in the *third* prayer. The defen-

dant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, and STEPHEN J.

Mayer and Frick, for the appellant, contended,

1. That the contract, if any, was that the plaintiff should be compensated out of the fund which should be awarded to the ship *Temperance*, and that no part of said fund ever came to the hands, or was at the disposal, of the defendant, or of the trustee, and that defendant has fulfilled such contract by giving the order on the Secretary of the Treasury, dated 5th March, 1823.

2. That if the said compensation was not payable out of the funds above mentioned, then that no other contract has been proved, by which the said defendant was liable, at the institution of the suit ; said suit having been brought on the 2d of July, 1825, and the contract, if any, for payment by *Kalkman*, having taken place in the year 1814. They referred to 3 *Wilson*, 207. 1 *Chitty on Bills*, 60, 63, 64. *Montgomerie vs. Ivers*. 17 *Johus. Reps.* 38. *Wetter vs. Rucker*, 5 *Serg. & Low*. 160. 1 *Peters* 193. *Ib.* 406, 439, 441, 442. *Ib.* 216. *On the second point to Oliver vs. Gray*, 1 *Harr. & Gill*, 204. *Buller vs. Harrison*, *Cowp.* 565.

Hoffman, for the appellee.

1. It does not appear when *Causten's* services as an agent commenced, but it is shown that he was engaged in 1821, and that in 1822, the act of Congress, for the compensation of the defendant, was passed. Whether, therefore, he was to be paid out of the fund, or by the parties, it is clear he was not to be paid, until the law passed, and the amount was ascertained by the award of the Commissioners, as the amount of the compensation which the plaintiff was to receive, depended on the amount to be awarded to the defendant. This award was not made until 1823, and as the suit was brought in 1825, limitations cannot be a bar.

2. The question is not whether the order, which *Kalkman* gave to *Causten*, was, or was not, a negotiable bill of exchange. It was an order, and the law implies a contract on the part of the drawer, to pay the payee the money mentioned in it, provided it is not paid by the drawee. But it was a bill of exchange, as between the drawer and payee, although the negotiable words are omitted. *Chitty on Bills*, 85, 86, 140, 144. The bill was not payable on a contingency—it was drawn on a fixed and certain fund in the hands of the drawee, and was absolute in its terms. It is not material, however, what the instrument may be called. It created a responsibility on the part of the drawer to pay, if the fund on which it was drawn should prove inadequate. *Montgomerie vs. Ivers*. 17 *Johns. Rep.* 38. *Chitty on Bills*, 121.

The record contains abundant proof to support the judgment independent of the order. The letter written by the defendant in 1821, shows that the plaintiff was then engaged in his service, and it requests him still to continue his exertions—these exertions were successful, and the money which was the fruit of them, was applied to the satisfaction of *Kalkman's* debts, and the plaintiff therefore is entitled to recover on the count for money paid.

EARLE J. delivered the opinion of the Court.

Our reflections on this case, have led us to the conclusion that the Court below were right, in refusing to give the directions prayed in the *first* and *second* prayers of the defendant, who is the appellant here. (The Judge here stated the facts of the case.) This being the testimony in behalf of the plaintiff, it is not easy to conceive how the Court could have given to the jury the directions asked in the first prayer—"that the plaintiff had adduced no evidence of any undertaking between him and the defendant, touching services for indemnification for the ship *Temperance*, by which the said *Kalkman* is liable to the said *Causten*, and that the plaintiff is not therefore entitled to recover." The

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evidence of the defendant's undertaking, looked them full in the face, and his liability under it seems without doubt. The time of the contract between the parties, is not ascertained, and was a proper subject for the jury, who might as fairly infer, that it was entered into a little anterior to the letter of the 7th of February, 1821, as that it bore date before the insolvency in 1817. And if the meaning of the prayer is, that the defendant's undertaking is barred by time, as was suggested by the counsel, the answer is, that the services were not performed until some time in the year 1822, and in March, 1823, the order on the Secretary acknowledges the justice of the plaintiff's demand, and that it was then a subsisting debt.

The Court's rejection of the instructions required in the second prayer, is also entitled to our decided approbation. If, under the contract, the plaintiff's compensation for services rendered was to be paid out of the sum allowed by the government, it does not necessarily follow that it cannot be recovered of the defendant. The personal remedy is unquestionable, if the plaintiff has been deprived of his compensation out of the funds, by the defendant's means, the fund here has not, in truth, come to his hand, nor is it now at the disposal of himself, or his trustee, but it has been snatched from the plaintiff, and wholly applied by the *United States*, to the payment of a debt due to them by the defendant, the justice of which he does not pretend to deny. The moment of appropriation by the *United States* is not known; neither is it worth inquiring into. The plaintiff had no lien upon the fund, arising out of the order, even if it had been presented before the money was applied to the payment of the custom house dues. It is not a bill of exchange, nor is the transaction within the pale of the law merchant, and there was no greater obligation on the *United States*, to pay in parcels, the sum awarded to *Kalkman*, than rests upon every private debtor, who has to pay a sum of money to a single individual creditor. If the *United States* had answered the order, it would have justified the pay-

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ment to *Causten*, and this is the only valuable legal purpose it could have been made to answer. But it has been in argument contended, that the *United States* had no authority to apply this fund to the payment of the custom house demand, inasmuch as it had been previously disposed of by the insolvent laws of Maryland, and belonged to the trustee of *Kalkman*. If this be so, it affords a substantial reason why *Kalkman's* order should not have been paid to *Causten* by the Secretary of the Treasury. There is, however, nothing in the objection. Had this money been paid to the trustee, the *United States* would have been entitled to it, to satisfy the custom house bonds, the act of Congress of 1799, ch. 128, giving them a priority of payment, in the disposition of insolvents' estates. 1 *Peters*, 438, 439, and the trustee would have had to perform the useless ceremony of receiving with one hand to pay with the other. Under whatever aspect this case can be considered, we think *Baltimore County Court* were correct, in refusing to instruct the jury, as prayed for by the defendant, and their judgment is affirmed.

JUDGMENT AFFIRMED.

STATE USE OF MAYOR AND CITY COUNCIL OF BALTIMORE
ET. AL. vs. BOYD—June, 1830.

The bond required from Executors by the act of 1798, ch. 101. Sub. ch. 14, sect. 6, is a testamentary bond within the meaning of the act of limitations, of 1729, ch. 24, sect. 21, and an action upon such bond not commenced within 12 years after the passing the same, will be barred by pleading the act of 1729 aforesaid.

Any bond required by law to be given by an Executor or Administrator, by reason of the assumed representative character of Executor or Administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be.

Statutes are sometimes extended to cases not within the letter; and cases are sometimes excluded from the operation of statutes though within the letter; on the principle that what is within the intention of the maker of a statute,

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is within the statute, though not within the letter, and that what is within the letter of the statute, and not within the intent of the maker, is excluded, it being an acknowledged rule in their construction, that the intention of the maker ought to be regarded.

APPEAL from *Baltimore County Court*.

This was an action of *debt*, instituted by the appellants, on the 26th of March, 1825, against the appellee, *James P. Boyd*, as one of the sureties in the testamentary bond of *Margaret M'Mechin* and *William M'Mechin*, Executors of *David M'Mechin*, bearing date July 21st, 1810. The following is the condition of the bond: "That if the above bound *Margaret M'Mechin* and *William M'Mechin*, Executors of *David M'Mechin*, late of *Baltimore County*, deceased, shall pay all just debts of, and claims against the deceased, and all damages which shall be recovered against them, as Executors, and also all legacies bequeathed by the will, then the above obligation shall be void; if otherwise to be in full force and virtue in law."

The defendant pleaded the act of limitations and several other pleas; but in virtue of an agreement by the counsel for the parties, a *pro forma* judgment was entered in the County Court for the defendant, and an appeal taken by the plaintiff to the Court of Appeals, "where the only questions to be decided, are, whether any of the acts of limitation be a bar to the plaintiff's claim, and whether the length of time, from the date of the bond, be not presumptive evidence of payment." Under this agreement, judgment in the County Court was accordingly entered for the defendant, and an appeal taken by the plaintiff, to the Court of Appeals.

The case came on to be argued before BUCHANAN, Ch. J., and EARLE, STEPHEN, and ARCHER, J.

Hoffman and *Mayer*, for the appellant, argued that so far as the bar of limitation is concerned, the questions arising in the cause are:

1. Whether the plaintiff's claim is barred by the act of Assembly of 1729. *ch. 24, s. 21*, which declares, "That all

actions upon administration and testamentary bonds shall be commenced within twelve years after the passing of the said bonds, and not after.”

2. If not barred by the act of 1729, *ch. 24, s. 21*, then whether the act of 1715, *ch. 23, s. 6*,—be a bar, under the provision that “no bill, bond, judgment, recognizance, statute merchant or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign lord the king, his heirs or successors, shall be good and pleadable, or admitted in evidence against any person or persons of this province after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing.”

To support the position that the act of 1729, *ch. 24, s. 21*, is a bar, the defendant must contend that the bond given in this case is a testamentary bond; and that it is embraced, too, by that act, although the law (1798, *ch. 101*.) which first creates the bond in question, passed nearly seventy years after the former act.

1. The plaintiff contends that :

1. The bond in question is not a testamentary bond in its nature—being given only in order to *dispense* with a testamentary bond so called—and a testamentary bond being such as the testamentary act of 1798, *ch. 101*, prescribes to be given by an executor or administrator in the ordinary course of administration, and to secure his accountability to the Orphans’ Court, but from which accountability, it is the pointed object of the present bond to free the executor or administrator :—That by giving this bond, the executor or administrator does for all purposes, except the form of probate and establishment of claims against the deceased, identify his representative with his own personal capacity—and that the bond, substantially, is not, therefore, his bond as executor or administrator, since it creates a liability that supersedes the qualified obligation peculiar to the legal character of executor and administrator.

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2. That if the bond be a testamentary bond, from the character of its provisions, it nevertheless does not come within the act of 1729, *ch. 24*, that act embracing only such bonds as existed of that designation when it passed, and that were then known to the testamentary system of Maryland, which was not the case with the present bond.

II. The plaintiff maintains that her claim is not barred by the provision of the act of 1715, *ch. 23, s. 6*.

1. Because the very terms of the bond require of the executor only to satisfy such debts of the deceased as shall "*be recovered against him as executor*;" and that looking only to that mode of establishing *the fact of the liability of the deceased*, there can be no default of the executor to which the bond can apply, until a judgment be had against him *as executor*, and he refuse or fail to satisfy the judgment: And that, consequently, the present claim "*standing in action*" only from 1816, the time of the judgment against the executor, until 1825, when this suit was brought, twelve years have not, according to the conditions of the act, run against the claim.

2. But, if even the terms of the bond did not *expressly* require a judgment to be obtained against the executor as preliminary to the claim of the creditor of the deceased on the bond, the nature of the obligation would, of itself, require such previous proceeding: because, 1st, such is the mode alone recognised by common law for determining the fact of a testator being indebted; and the provision of the act creating this bond is not, except where necessity so requires it, to be construed to repeal or alter the antecedent common law of proof of claims against the deceased; but is to be understood to have, by the bond, given an additional security for payment of claims *thus established*, in relieving the creditor from the trouble of finding assets of the deceased: and, 2d, because the act of 1798, *ch. 101, sub ch. 4. s. 6*, contemplates the proceeding against an executor, *as such*, to establish the debt of the testator in declaring that, "*if suit be brought against him AS EXECUTOR, the judgment shall be*

for the whole sum found by the jury, or otherwise ascertained; and execution may issue and have effect as if he were sued in his own right ;” and, 4th, because the responsibility of the surety, now sued, being merely collateral to the liability of the executor *as* executor, the issue of the *testator's* liability for the debt, could not be tried in the suit against the surety on the bond: the only issue in such a suit being the *executor's* liability ; and all inquiry behind any judgment for the debt against the executor being denied to the surety.

3. The plaintiff, however, contends that if this be not deemed a testamentary bond within the act of 1729, *ch. 24*, then no act of limitation applies to it, since the act of 1715, *ch. 23, sec. 6*, the only act of limitation on the subject of bonds, excepts all bonds given “*in the name or for the use*” of the king: and the plaintiff maintains that the *State of Maryland*, to whom the bond in question is given, has succeeded to the same sovereign exemption that the king had by that section of the act: and that, but for the act of 1729, *ch. 24, sec. 21*, there would be no bar of limitations in this State against even an ordinary testamentary or administration bond ; such bonds not having been reached by the act of 1715, *ch. 23, sec. 6*.

III. On the point of presumption of payment from the lapse of time since the date of the bond, the appellant contends that this is not a case to which such presumption can apply.

1. Because it is applicable only to cases of bonds, with conditions for paying liquidated and fixed amounts at defined periods ; and not to bonds with collateral conditions for contingent or unascertained responsibilities, indeterminate both as to time and amount.

2. But, at all events, at the commencement of the suit, a sufficient time had not elapsed for such a presumption, according to the period fixed by the cases in *England* on this doctrine.

3. And the appellant contends, that the doctrine in question having grown up in *England*, to supply a bar of limita-

tions for bonds, for which no statute had provided, it is not to be recognised here, where there exists an act of Assembly establishing such limitations. The referred to the acts of 1715, *ch. 23, sec. 6.* 1729, *ch. 24, sec. 21.* 1798, *ch. 101. Sub. ch. 14, sec. 6.* *Val. Dep. Com.* 179. *Toll. Exrs.* 96, 496. 6 *Bac. Abr.* 383. *Ib.* 391. *Salisbury vs. Black*, 6 *Harr. and Johns.* 293. *Montgomery vs. Hernandez*, 12 *Wheat.* 129. Act of 1802, *ch. 101, sec. 9.* *Braxton vs. Winslow*, *Wash. Va. Rep.* 31. *Com. Dig.* (Covenant) *Letter E.* 2 *Saund.* 177. *Ward vs. Reeder*, 2 *Harr. and M'Hen.* 152. *Kelly vs. Greenfield*, *Ib.* 138. *State vs. Rogers and wife*, 198. *State vs. Stump and Gilpin*, *Ib.* 174. *Murray vs. Ridley*, 3 *Ib.* 175. *Davidson vs. Clayland*, 1 *Harr. and Johns.* 548. *Hall vs. Gittings*, 2 *Harr. and Johns.* 112. *Howard vs. Moale*, *Ib.* 260. *Patterson vs. Md. Ins. Co.* 3 *Ib.* 71. 3 *Stark. Ev.* 1089.

Meredith, for the appellee.

The point on the presumption of payment from lapse of time is abandoned.

1. The bond on which this action is brought, is not within the exception of the 6th sec. of the act of 1715, *ch. 23.* It is to be sure, within the terms of the section; but the interpretation of a statute of this description, is to be liberal, its object being to put an end to controversies between citizens—the statute of *James* was by the Courts extended to the action of *assumpsit*, though it is not mentioned—in the exposition of statutes, common law principles are to be regarded. 6 *Bac. Abrid.* 384. 1 *Kent's Com.* 423. As evidence of the disposition of Courts to enlarge the operation of the act of limitations, he referred to *McLuny vs. Siliman*, 3 *Peters Rep.* 278. The reason of the rule, that limitations do not run against the *King*, only applies to cases in which he is directly interested, and not to cases, where, for the public convenience, his name is used, merely for the benefit of others. The object of the exception is perfectly obvious, and, to accomplish that object, the word “or” may

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be read and, *Fowler vs. Padget*, 7 Term Rep. 509. He cited also *Schell vs. State*, 3 Harr. and Johns. 538. *State vs. Wright*, 4 Ib. 148, and the act of 1729, *ch.* 24, *sec.* 15.

2. The right to sue on this bond commenced immediately upon its execution—the executor thereby made the debts of his testator his own, and of course the preliminary proceedings against the executor, as such, are dispensed with—the act of 1820, *ch.* 24, applies only to ordinary testamentary bonds. *Salisbury vs. Black*, 6 Harr. and Johns. 293. *Angel on Lim.* 181.

3. The bond in this case is a testamentary bond, within the act of 1729; but if it is not strictly within the law, it is within its meaning and the mischief intended to be prevented, and the act will be expanded to embrace it. *Angel on Lim.* 162. The act of 1729, operates prospectively on bonds of this description. *Adams vs. Woods*, 2 Cranch, 336.

BUCHANAN, Ch. J. delivered the opinion of the Court.

The bond upon which this suit was brought, was given to the State by *Margaret McMechin*, who was executrix, and *William McMechin*, who was executor of *David McMechin*, with *D. Carroll* and *James P. Boyd*, as sureties, in pursuance of the act of 1798, *ch.* 101, *sub. ch.* 14, *sec.* 6, which provides, that “no executor shall be obliged to exhibit any inventory, or account, provided he will give bond, instead of the bond herein before directed, with such security, and in such penalty, as the Court shall approve to the State of Maryland, to be recorded, and sued, as before directed, with condition for paying all just debts of, and claims against the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will,” which are the words of the condition of this bond.

The defendant pleaded five pleas, upon some of which there were issues joined, and demurrers to the rest; whereupon at the trial, a judgment *pro forma* was rendered for the defendant, upon an agreement filed in the cause, by which the only questions presented to this Court on the ap-

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peal are, whether either of the acts of limitations of this State, which were pleaded, be a bar to the appellant's claim, and whether the length of time from the date of the bond, be not presumptive evidence of payment. The latter point being abandoned by the Counsel for the defendant, our enquiry is restricted to the questions arising upon the pleas of the acts of limitations.

The act of 1729, *ch. 24, sec. 21*, provides, "that all actions upon administration and testamentary bonds, shall be commenced within twelve years after the passing the said bonds, and not after." This bond bears date the 21st of July, 1810, and the original writ was impetrated on the 26th of March, 1825, almost fifteen years after the date of the bond; and if it is to be considered as a testamentary bond, within the operation of that act, the right of the appellant to recover is thereby barred. Is it then such a bond? The condition is not, indeed, in the form of the ordinary testamentary bond, nor of that which was in use, when the act of 1729 was passed; and such a bond given by one not connected with the administration of assets, but a mere stranger, would not be deemed a testamentary or administration bond. But any bond that is required by law to be given by an executor or administrator, by reason of the assumed representative character of executor or administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be. The bond in question was given in pursuance, and under the authority of an act of the Legislature, by an executrix and executor named in the will, to secure the payment of all just debts of, and claims against, the deceased, and also all legacies bequeathed by the will, and all damages recovered against them as executors, and does not destroy the representative character any more than the ordinary testamentary bond. On the contrary, the same section of the act, entitled "An act for amending and reducing into system, the laws and regulations concerning last wills and testaments, the duties of executors, ad-

ministrators and guardians, and the rights of orphans and other representatives of deceased persons," commonly called the testamentary system, which provides for the giving of such a bond by an executor, also provides, "that in case such a bond be given by an executor, he shall be answerable for all debts, claims and damages, recovered against him *as executor*; and if suit be brought against him *as executor*, that the judgment shall be for the whole sum found by the jury, or otherwise ascertained, and execution may issue and have effect. as if he were sued in his own right." Thus clearly shewing the continuance of the representative capacity, in which he may be sued, just as when the ordinary testamentary bond is given. With this difference only, that on giving such a bond, in lieu of the ordinary testamentary bond, he is discharged from the obligation to exhibit any inventory, or account, and is rendered answerable for all the debts, legacies, &c. with or without assets, coming to his hands. Whereas, in the case of the ordinary testamentary bond being given, he is subjected only to a qualified liability. And why should a bond by an executor, which, (whether assets sufficient come to his hand or not) subjects him to the absolute payment of all the debts and legacies, be deemed less a testamentary bond, than one which subjects him to an eventual liability only; when, in neither case does he lose his representative character; but may equally in each, sue, and be sued, as executor. By the 10th section of the 3d *sub. ch.* of the same act, it is provided, "that any bond executed by an executor or executrix, administrator or administratrix, as hereafter mentioned, shall be recorded in the office of the Register of Wills, where administration is granted;" and "that any person conceiving himself, or herself, interested in the administration of said estate, shall be entitled to a copy, upon which an action may be maintained, &c." The words "any bond executed by an executor," and "as hereafter mentioned," thus pointing as well to the bond provided for by the subsequent section, under which this bond was given, as to the ordinary bond by an execu-

tor, and making no distinction between them, but placing them on the same footing, by making them equally liable to be put in suit, by any person interested in the administration of the estate. The section under which this bond was given, is a branch of the testamentary system providing for a particular mode of administering the estates of deceased persons ; and the bond required to be given by an executor, (and without which, letters testamentary cannot be granted,) like the ordinary bond of an executor, is for the protection and security of the rights of those interested in the administration of the assets. They are given under the same system, with the same object, by persons acting in the same capacity, and equally under the directions of the will of the testator, and are, we think, equally testamentary bonds. Suppose the testamentary system had provided for no other bond to be given by an executor, could there then have been a doubt, whether it was or not a testamentary bond, and can it be considered as having a different character imparted to it, by the mere circumstance, that there is another bond provided for, suited to a different state of things, or to the mere ordinary mode of administration. But it is strongly urged that assuming this to be a testamentary bond, it is not within the operation of the act of 1729, which is supposed to contemplate only the testamentary bond, then in use in this State, and not to embrace testamentary bonds of any other description. However ingeniously pressed, it is the opinion of this Court, that the position contended for cannot be sustained. Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter; on the principle that what is within the intention of the makers of a statute, is within the statute, though not within the letter ; and that what is within the letter of a statute, but not within the intention of the makers, is not within the statute, it being an acknowledged rule in the construction of statutes, that the intention of the makers ought to be regarded. Viewing the bond in question as a testa-

mentary bond, it is within the letter of the statute of 1729, which speaks in terms of "all actions upon administration and testamentary bonds." Suppose then, the legislators who passed that law, were now convened, and asked whether they intended that it should operate only upon the administration and testamentary bonds then in use, or that it should extend to any administration or testamentary bonds within the mischief intended to be provided for, that might at any time be required, or authorised by law, to be given? Can it be doubted what the answer would be, looking to the object of the legislature, which was the general repose and quiet of society, by protecting men from the vexatious prosecution of stale claims, supposed by length of time, to have been paid, but the evidences lost. Not a reason is to be assigned, why there should be a limitation of time to the bringing of suits, on the ordinary testamentary bonds, that does not apply with equal force to this. It is true, that such a bond as this was not at that time known, nor in common use, but the legislature had a right to create it, and it is equally true, that it is within the mischief intended to be remedied, that is the bringing of suits on testamentary and administration bonds, after a lapse of twelve years from their date, and also within the spirit of the act. And being within the spirit and reason, and letter of the act, and also within the mischief intended to be remedied, there is no rule of construction which excludes it from the operation of the act.

This view of the character of the bond, and of the operation upon it of the act of 1729, renders it unnecessary to enquire whether, if this was not a testamentary bond, the claim of the appellant would be barred by the act of 1715.

JUDGMENT AFFIRMED.

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C filed a bill in Chancery to recover dower in certain real property, upon which that Court appointed a receiver to receive the rents and profits pending the controversy. After this, *The Mayor and City Council of Baltimore* filed their petition against the receiver, praying to be paid for taxes due on said property prior to the time of the receiver's appointment, out of the rents which had come to his hands. The petition did not aver that there was no personal property of the tenant in possession to be found sufficient to pay the taxes charged, nor was the tenant in possession at the time the taxes became due, who, by law, is chargeable with their payment, made a party. **Held**, that they could not recover.

It is a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, when the land is not charged with the payment of his claim.

In the collection of taxes imposed upon real estate within the city of Baltimore, for the year 1821, the ordinances of that city imposing them, having referred to the Laws of the State, for the manner of collecting them, the land can never be sold for their payment, unless the Collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance.

APPEAL from the Court of Chancery.

This petition, which was filed on the 27th October, 1826, by the appellants, stated, that certain taxes due to them for the year 1821, upon certain real estate in the city of *Baltimore*, (and which was then in the hands of a receiver, appointed by the Court of Chancery, in the case of *Hannah K. Chase*, against the appellees,) amounted to the sum of \$156. That said taxes were duly imposed by ordinances, passed in virtue of the act of incorporation of *The Mayor and City Council of Baltimore*, and the several supplements thereto. They therefore prayed that the said receiver, out of the rents and profits of said estate, be authorised and directed by an order of the Court, to pay the said sum of money, with interest thereon, from the 1st day of January, 1822.

On this petition, *Bland*, Chancellor, passed the following order, March 23, 1827: On the foregoing application, it is ordered that the receiver in the said case, pay out of the first money received by him, as receiver, the sum claimed by this

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petition, unless cause to the contrary be shewn by the parties to the said cause, before the 16th day of May next: *Provided* a copy of this order, and the foregoing petition, be served on the said parties, or their solicitors, before the 16th of April next.

The defendants, *Ann Chase, Matilda Ridgely* and *Samuel Chase*, to this petition, pleaded *non assumpsit*, and the act of limitations, and by their *answer* denied that the appellants have any just or equitable claim, or lien, or charge whatever on the premises in the proceedings mentioned, which can be decided in a Court of Chancery; and they insisted, that if the appellants have any claim at all against them, it is a legal claim, and properly examinable in a court of law.

The petitioners filed their account for the said taxes, with the affidavit of the collector of the city tax annexed, that the bill for the same was duly delivered, and that no part thereof has been paid, or satisfied, but that the whole is still due and owing to the said petitioners; and also a copy of the assessment of the property, and of the ordinances imposing the taxes and tax bill, all under the corporate seal.

BLAND, Chancellor, (June 28th, 1827.) After hearing the parties by their solicitors, and considering the petition, plea or answer thereto, and proceedings, I am of opinion that the case set forth by the petition is not one of such an equitable character as falls within the cognizance of this Court. Whereupon it is ordered, that said petition *be dismissed with costs*.

From this order the petitioners appealed to the Court of Appeals.

The case was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

Scott, for the appellant, contended, 1. That the taxes mentioned in the petition were duly imposed and chargeable upon the premises, in the proceedings referred to in

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the case of *Hannah K. Chase* vs. the appellees, in which the said petition was filed. 2. That the rents and profits of the property were the proper fund out of which the said taxes should have been paid. 3. That those rents and profits being in the hands of a receiver, theretofore appointed by the Chancellor in the said cause, and under the control of the Court of Chancery, that the Chancellor should have directed the payment of the taxes by the receiver, out of rents and profits of the estate, and erred in dismissing the petition of the appellants. He referred in his argument to the acts of 1796, *ch.* 68. 1817, *ch.* 148. 1817, *ch.* 195. 1818, *ch.* 122. *The Ordinances of the Mayor and City Council of 1821, ch.* 20. 1821, *ch.* 37. *The Act of 1825, ch.* 184. 1 *Cov. Pow. on Mortg.* 294, (note) 299, (a) 299, (b) 302, (a.) *The Act of 1817, ch.* 148, *sec.* 4.

A. C. Magruder, for the appellees, contended, 1. That the Court of Chancery has no jurisdiction to collect taxes for the city of *Baltimore*. The Court might, perhaps, have entertained the petition, if the application had been to pay taxes accrued while the premises were held by the receiver, but here they accrued before his appointment. 2. The taxes were disputed, and there is no evidence that they were due. The affidavit of the collector, and the certificate of the assessment, &c. under the corporate seal, is not such evidence as the act of 1825, *ch.* 184, requires. 3. But the party in possession of the premises in 1821, when the taxes accrued, was the proper person to pay them, and who he was does not appear. 4. By the act of 1797, real estate is made subject to be sold for taxes, where the personal is insufficient; but only when its requisitions are fully complied with, of which there is no proof in this case.

STEPHEN, J. delivered the opinion of the Court.

The object of the petition filed in this case, was to recover certain taxes due to the corporation of the city of *Baltimore* for the year 1821. Some time prior to the filing

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of the petition in this case, a bill was filed in the high Court of Chancery by *Hannah Kitty Chase*, against these defendants, and others, for the purpose of recovering her right of dower in the property upon which the tax was imposed. In that case the Chancellor thought fit to appoint a receiver, to receive the rents and profits pending the controversy between the parties. This receiver was appointed in the year 1826, long subsequent to the time when the taxes became due. The petition prayed the Chancellor to pass an order authorising and directing the receiver to pay the said taxes, amounting to the sum of \$156, with interest thereon from 1st January, 1822. On this petition the Chancellor passed the order, and the proceedings before set forth took place.

In the first place it will be remarked that it is not averred by the petition that there was not personal property upon the premises sufficient to pay the taxes charged, nor is the tenant in possession at the time the taxes became due, made a party to the proceedings. By the act of 1796, *ch* 68, to erect *Baltimore* town into a city, the corporation are vested with power to lay and to collect taxes, and to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city of *Baltimore*. This power and jurisdiction to lay taxes, was, by the act of 1796, subject to a limitation, as therein prescribed; which restriction, however, is removed by the act of 1817, *ch*. 148, *sec*. 4, by which it is enacted "that the *Mayor and City Council of Baltimore* shall have power to lay and collect *direct* taxes, on the assessment of private property within the city, to such an amount as shall be thought necessary for the public or city purposes; and may enforce the collection of all dues and impositions, except fines, penalties and forfeitures, in the same manner as is now provided with respect to city taxes; and tenants in possession shall be liable to the payment of taxes imposed upon premises occupied by them, without its operating however to alter the nature of contracts between landlords and tenants."

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Under these delegated powers, the taxes in question were imposed by ordinances passed in 1821, Chs. 20 and 37. Sec. 3 of Ch. 20 provides that the taxes imposed by that law shall be collected and paid in the manner prescribed by the laws of the State, or ordinances of this corporation; and sec. 1 of Ch. 37, provides that the said direct tax shall be paid and collected in the manner prescribed by acts of Assembly, or ordinances of the city. By the 10th sec. of the act of incorporation, it is enacted "that the person or persons appointed to collect any tax, imposed in virtue of the powers granted by this act, shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith; but no sale shall be made, unless *ten* days previous notice thereof be given; and if the tax imposed shall be chargeable on any real property, and no goods or chattels can be found, liable to be distressed therefor, the same may be recovered by action of debt, or attachment in *Baltimore County Court*, in which no imparlance shall be allowed." By the provisions of this section, it is clear that no power is given to sell the land, but the collector is to recover the tax by distress of the goods and chattels of the person chargeable with the tax, who, we have seen by the act of 1817, before referred to, is the tenant in possession of the property upon which the tax is imposed. The several ordinances imposing the taxes in question, having referred to the laws of the State for the manner of collecting them, it becomes necessary to advert to the several acts of Assembly upon that subject. By the act of 1794, *ch.* 53, *sec.* 1, the *Levy* courts are directed to appoint a collector for the several counties, to collect the county charges; and the 7th sec. provides, "that if any collector shall proceed to the sale of any goods or chattels, to enforce the payment of the county charge, he shall be entitled to receive the same fees as are, or shall be established by law, on the service of executions." The act of 1797, *ch.* 90, provides "that where any lands may become charged for the payment of county taxes, and

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the collector of the county can find no personal property in said county liable for, or chargeable with, the payment of the same, the land, in the manner therein specified, may be sold, by order of the commissioners of the tax, to the highest bidder, to discharge the taxes thereon due." By the provisions of this act of Assembly, it appears that the land can never be sold for the payment of taxes for which it is charged, unless the collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance. As therefore, the petition in the case does not allege that there was no personal property which could be made liable, it follows necessarily that no ground was furnished by it, for the interposition of a court of equity; and the Chancellor was clearly right in refusing the application to compel his officer to pay the same out of the rents and profits received by him. It is also clear, upon established principles, that the tenant in possession, who by law is chargeable with the payment of the tax, ought to have been made a party, for the purpose of ascertaining whether or not the tax had been paid; on the same ground as has been decided by this Court, that the executor or administrator must be made a party where a Court of Chancery is resorted to for a sale of the real property, for payment of debts, where the personal fund is charged to be insufficient for that purpose. *Tyler, et al. vs. Bowie's Adm'rs*, 4 Harr. and Johns. 333. It is also a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, where the land is not charged with the payment of his claim. As where there was a mortgage for one hundred years, to raise portions for daughters. After the expiration of the mortgage term, the Court would not compel the receiver to account for the rents and profits received during the term, after it had expired, the land being then discharged. To entitle themselves to be paid in this case by the receiver,

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it was necessary to shew by their petition, that they had a right to proceed against the land to satisfy their demand. *Gusley vs. Adderley*, 1 *Swonst. Rep.* 573.

DECREE AFFIRMED.

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The plaintiff and defendant being joint owners of a line of stages, agreed as follows : “ I (the defendant) hereby acknowledge to have received of D. (the plaintiff) stage proprietor on the W. and B. road, \$9000, as a full compensation for the within named four teams, and two coaches ; and I bind myself to withdraw all my pretensions to any part of said road ; and I herewith deliver to the said D. the teams as they are at this instant, on the road between this place, (B.) and W. ; and further pledge myself not to be concerned, *direct or indirect*, in any line of stages in opposition to him.” HELD, that in construing this contract, the Court must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. The motive was to become sole proprietor of all the stages on that road, and to shut out all opposition. To effect that object, the purchase of the defendant’s interest in the stages was made.

The intention of the contract was that the defendant should, in good faith, not only *not* become *interested* in any opposition, but that he would *not* in any manner aid or become instrumental in the setting up, or carrying on an opposition line.

The word “ *indirect* ” was used for the special purpose of guarding against any kind of interference by the defendant, in aiding, or in any manner promoting the establishment of, or carrying on, any opposition.

A line of stages being established in opposition to the plaintiff’s line, the Court held, that if the defendant furnished its owners with money, credit, or other means, for the purpose of enabling them to carry it on, and that the means so furnished, did enable them to establish and carry it on, and that they could not have established or carried it on without such means, or that the defendant did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the *better* to establish or carry it on, and that such means did so enable them, then the plaintiff was entitled to recover damages for a breach of the said contract.

When there is any legal admissible evidence, *tending to prove* the issue in a cause, the effect of that evidence is solely for the consideration of the Jury.

When there is no evidence applicable to the issue, or tending to prove any material fact, there is a total failure of evidence, the Court will direct the Jury accordingly.

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APPEAL from *Baltimore County Court*.

This was an action upon the case, brought upon the 26th of January, 1826, by the appellants, *John Davis* and others, constituting the firm of *David Barnum & Co.* against *John H. Barney*, the appellee. The declaration contained three counts.

The *first* averred that whereas the said defendant, before and at the time of making the agreement and undertaking hereinafter next mentioned, was the owner and proprietor of certain teams and coaches, for the carriage and conveyance of passengers from *Baltimore* city, in the county aforesaid, to *Washington* and *Georgetown*, in the *District of Columbia*, and also from *Washington* and *Georgetown* aforesaid, to the said city of *Baltimore*; and being owner and proprietor, as aforesaid, the said defendant, on the 30th September, 1825, at, &c. in consideration that the said plaintiffs had paid to him the sum of \$9000, as a full compensation for his four teams, (say sixteen horses) and two coaches, then running on the road between *Baltimore* city and *Washington* aforesaid, did promise and undertake, to withdraw all his pretensions to any part of the said road, and not to be concerned, direct or indirect, in any line of stages in opposition to those then owned and employed by the said plaintiffs; yet the said defendant, not regarding his said promise and undertaking, but intending to deceive and defraud the said plaintiffs in this behalf, did, afterwards, to wit, on, &c. at, &c. became sole owner of a line of stages, which were for a long space of time, to wit, &c. used and employed by the said defendant, on the said road, between the said city of *B.* and *W.* and *G.* to wit. &c. in the carriage and conveyance of passengers, in opposition to the line of stages then and there owned by the said plaintiffs, and employed and used by them on the said road as aforesaid.

2d Count.—And whereas also, heretofore, to wit, &c. at, &c. in consideration that the said plaintiffs had paid to the said defendant, the sum of \$9000, as a full compensation for his four teams, (say sixteen horses) and two coaches, then

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running on the *W.* and *B.* road, he, the said defendant, did then and there promise and undertake, to withdraw all his pretension to any part of the said road, and not to be concerned, direct or indirect, in any line of stages in opposition to them, the said plaintiffs. Yet the said defendant, not regarding his said last mentioned promise and undertaking, but contriving, &c. did afterwards, to wit, on, &c. at, &c. become part owner of a line of stages, which were, for a long space of time, to wit, &c. used and employed by the said defendant, on the said road, in the carriage and conveyance of passengers, in opposition to the line of stages owned by the plaintiffs and employed and used by them on the said road.

3d Count.—And whereas also, heretofore, to wit, on, &c. at, &c. in consideration that the said plaintiffs had paid to the said defendants, the sum of \$9000, the said defendant then and there promised and undertook to withdraw all his pretensions to any part of the said road, and to deliver to the said plaintiff four teams and two coaches, as they then were upon the said road from *B.* to *W.*, and did further promise and undertake, not to be concerned, direct or indirect, in any line of stages in opposition to the said plaintiffs. Yet the said defendants, not regarding, &c. but contriving, &c. did afterwards, to wit, on, &c. at, &c. become concerned, indirectly, in establishing and carrying on a line of stages, which were for a long space of time, to wit, &c. used and employed on the said road, in the carriage and transportation of passengers, in opposition to the line of stages owned by the said plaintiffs, and used and employed by them on the said road as aforesaid, during the time of such opposition as aforesaid, to the damage, &c.

The defendant pleaded *non assumpsit*, and issued was joined.

1st Exception.—At the trial of this case, the plaintiffs, to support the issue on their part, proved that they and the said defendant, being joint owners of a line of stages on the *Washington* and *Baltimore* road, after various negotiations, entered into the following contract.

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“ Dear sir,—In answer to your request, I hereby agree to take for my four teams, (say sixteen horses) and two coaches, now running on the *Washington* road, \$9,000, and will withdraw all pretensions whatever of my interest on the said road—the payments must be cash, or such paper that will command *cash*. On this being complied with, I will give, from under my hand, not to have any interest in the staging on the said road. I still hold one-sixth of a share in the Steam Boat Company, on the *Potomac* river, as a sett against any claim that has or may hereafter come against me as a proprietor of the said company. This must be taken as my *ultimatum*. I am, dear sir, your obedient servant, *John H. Barney. David Barnum, Esq.*”

“*Baltimore, 30th September, 1825.* I hereby acknowledge to have received of Messrs. *David Barnum & Co.* stage proprietors on the *Washington* and *Baltimore* road, \$9,000, as a full compensation for the within named four teams and two coaches; and I bind myself to withdraw all my pretensions to any part of the said road, and I herewith deliver to the said company, the teams as they are at this instant, on the road between this place and *Washington*, and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them. *John H. Barney.*”

And the plaintiffs further offered in evidence, that after such contract was entered into, and before the institution of this suit, that is to say, on the 30th of October, 1825, a line of stages, in opposition to that of the plaintiffs, was set up, and was carried on until the 1st of September, 1827, upon the said road; and that the stages and horses used on said road, stabled at, and started from the stables of the defendant, and that the drivers of such opposition line of stages, boarded at the house of the defendant, and that every thing was carried on precisely in the same manner, after such opposition line was established and carried on, as before the sale and contract before referred to, in this exception, except that *Mr.*

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Thompson had the management instead of *B.* He also proved that three stages belonging to the defendant, when witness drove for *Mr. B.*, previous to said contract; four horses and three sets of geers also belonging to the defendant, when witness drove for him previous to said contract, were used upon this opposition line; and also proved that *B.* the defendant, at the time one of the witnesses came to drive on this opposition line, was indebted to said witness, and told said *Stephen J. Thompson*, to pay said witness, provided he came and drove for him, *Thompson*—and also proved that *B.* said to a witness when speaking of this line, we want drivers—that such words induced *witness* to ask the defendant if he was concerned, to which he replied no—they also proved that *B.* neither kept a boarding house nor livery stables—and that before the contract before mentioned, the defendant, *B.* ran a team of horses on the *Philadelphia* road, from *Baltimore*, in a line of stages on that road, and that he retained his interest in said *Philadelphia* road, till the fall of 1826, when it was placed in the name of *Stephen J. T.*; and also proved that the same horses which run on the *Washington* and *Baltimore* road, in the line of stages in opposition to said plaintiffs, were used to run on the *Philadelphia* road, and in that part of the line belonging to *B.* which was the first ten miles from *Baltimore*; and that the said *Stephen J. T.*, was the son-in-law of *B.* and resided during all this time aforesaid, and for many years before, with said *B.*, and that in the year 1822, the said *Stephen J. T.*, applied for the benefit of the insolvent laws, and in March term, 1823, obtained his final release; since when, until this opposition line was started, he was not engaged in any kind of business, nor has he since been engaged in any other business than as the agent of this line, and as agent for his brother; and the plaintiffs further gave in evidence that the stables which were so rented by the defendant, to the said *Thompson*, for the use of the said opposition line, were situated in the rear of the defendant's

dwelling house, and that the stages of the said line daily passed his door, and that the defendant went to the stage office three or four times in two years, and when there, enquired of the agent of said *Thompson* how they were coming on: and that the stages and horses sold and delivered by the defendant to the plaintiff, independent of their part of the line, were worth not more than \$2000: and that whilst the defendant was the avowed owner of a line of stages, he did not come to see the horses once in nine or ten months, trusting to the drivers. The plaintiffs also offered in evidence, that *John V. Thompson*, the brother of *Stephen J. T.*, above mentioned, is, and has been for many years, a resident of the city of *Baltimore*, and that he followed the trade of a journeyman saddler for *several years*, but quitted it about seven years ago, because he was short-sighted: the witness said he had no means of knowing the situation of said *Thompson*; that he never had occasion to enquire into his circumstances, and he might have had money without witness knowing any thing about it: witness never considered *John V. Thompson* as a man who would be in credit for a large sum of money; he might have had thousands without his knowing it. Whereupon the defendant, to support the issue on his part, offered in evidence to the jury, by *Stephen J. T.*, that he, the witness, was present when sale was completed, as mentioned in the said contract; that defendant observed that he had not received as much as his property was worth; that if they, the plaintiffs, would permit him still to hold an interest for the residue of the mail contract, which had two years and three months to run, and discharge him from his contract, he would return the money received, which was then in his, defendant's hand, and give them up their note for the balance, and \$1000. He then offered to sell to the said plaintiffs, the remainder of his property, consisting of stages, horses and gears. He also offered to rent to the plaintiffs, his stables, one of whom expressed his regret that the stables were not situated nearer him, all which they re-

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fused. Witness commenced to run a line of stages from *Baltimore* to *Washington* about the 30th October, 1825, and purchased of defendant the stages, horses and gears, so offered by him to the plaintiffs, and refused to be taken by them; and also, after sale to the plaintiffs by the defendant, he, *Thompson*, purchased out his, defendant's, team on the *Philadelphia* route, with his interest in the contract on that route upon the last mentioned purchase. Defendant and witness went to *McDonald*, to whom defendant stated that he had sold out on the *Philadelphia* road to witness, who in future would hold the interest in the said line called the *Union* line, *McDonald* being one of the owners of said line. Witness stated that his brother *John* had enabled him to purchase out the defendant in the first instance, and establish his line of stages to *Washington*; and that his brother *William* was subsequently interested, and furnished the means—he appeared as agent. That the present defendant never was interested therein, either in establishing said line, or continuing it, and had no concern with the line after witness bought out the defendant; he had two horses remaining, which he kept for his own use through the summer. Witness applied to him to let him have them during the winter; this application was in the fall, and witness agreed to winter them without any charge for their keeping, as defendant had no use for them in the winter; nothing was said of the kind of use witness should apply them to. Witness had, at the time, a small carryall and a gig; and drove them sometimes in one, and sometimes in the other: also, in the course of the winter, drove them in the stage on the *Washington* road; this without any express consent of the defendant, who, witness presumes, knew they were so driven, but does not know whether or not—does not know how long driven in the stage, or when first put in; they might have been driven one-third, or one-half the time in the stage; the horses and stages which witness had on the two routes, cost at different times, a little less than \$5000. *John V. Thompson*, was

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the sole owner until some time about August, 1826, then sold out to *William D. Thompson*. *John V. Thompson* was at the office every day whilst interested; his health did not permit him to do much, but the business was considered under his eye; books kept in witness' name as agent; never received one dollar of defendant; he did not pay defendant for stages and horses purchased; the price was agreed on, and was to be paid when convenient to the witness, he paying interest therefor; the amount not yet paid. Witness considered himself, as agent, and his brother also, responsible to defendant for the property so purchased as before mentioned, and for which he had agreed to give \$1050, but he did not consider himself as individually responsible; the amount to be paid when convenient, but to bear interest; which interest was, at different periods, paid to defendant, as well as rent and board; believes interest to have been rather overpaid; no note was given for the amount of purchase; begun to pay to defendant on account of interest, &c. within six months after contract. Witness had sometimes had two or three, sometimes five or six drivers and porters boarding with the defendant; the defendant sold out the *Annapolis* line to *Mitchell*, shortly after his contract with the plaintiffs; when defendant owned stages, one seldom went out without his examining it particularly; since he sold out, have not seen him three times in the stable yard; never once saw him in the stable. Witness, before contract between defendant and plaintiff, told *Smith*, one of the company, and one of the plaintiffs, whose death is suggested, that he, witness, meant to establish a line of stages between *Washington* and *Baltimore*; that he repeated the same thing to *Smith*, on different occasions, and told him if plaintiffs completed their contract with defendant, *he* would not prevent his going on. Upon being asked whether he informed plaintiffs at the time of contract, says he did not at that time; that he had previously done so to *Smith*, and did not think it necessary or proper to repeat it; he presumed them all acquainted with the

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fact, and did not think it to his interest, or proper for him to interfere with defendant's contract. Witness mentioned to the defendant, some time before he sold out, that if the plaintiffs run him off the route, and he would permit him to become interested, he would join him. Witness subsequently took the entire possession of a small house belonging to defendant, and near his dwelling; that when he did so he took his drivers to board, and then by agreement with defendant, the sum to be paid him annually for rent of house, stables, shed, and interest, was \$1000, being reduced to that sum from \$1600. Witness received a bill of the purchase, and gave no note therefor; agreed to give for the rent of stable, board and interest, \$1600 per annum. *John V. Thompson* advanced to witness, on account of the line, \$4825; this amount placed with witness in September and October, 1825, as occasion required. Witness' brother *John* kept no bank book, that he knows of, nor did he know of his selling any stock, and paid him the \$4825 in cash, and not in any instance by a check. Witness agreed to give defendant for the residue of his stages, horses and gears, \$1050. Witness also purchased for cash, one stage in *Philadelphia*; never made any dividend; believes there was no profit made; as money was received, it was applied to bearing expenses and buying fresh horses, &c. Witness' brother *John* sold out to his brother *William*; no statement was then exhibited. Witness was to have the benefit derived from the stages. Witness rented of *B.* his stables, which were very large and spacious, and had been built by defendant many years before, for his own accommodation and use, at a heavy expense, when largely interested in stages; and also boarded with him, as he did his drivers, and was to give for the use of the stables, boarding of himself, drivers, infant child and servant, and the interest on the \$1050 above mentioned, \$1600: and said *B.* had convenient accommodations for boarding drivers; stables and kitchen were in the same yard. The two horses hired from Mr. *B.* being at the expense of wintering them, were returned to

him the March following, on demand by him. Said *Thompson* had become an insolvent debtor in 1822, and when he established the line of stages as aforesaid, he thought it prudent to conceal his interest in the said line, (having before taken counsel) lest he might be embarrassed by his creditors, one of whom was the *United States*. The defendant further offered in evidence by one *Grant*, that he, *Grant*, had lived with defendant for fifteen or twenty years before he sold out to the plaintiffs; that when he sold out, he dismissed witness, who remained out of employment from four to six weeks, except in going at the request of one of the owners of the *Annapolis* line, three times a week during part of that time, to attend the *Annapolis* stage. When *Thompson* commenced, he employed witness; he has since acted as *Thompson's* clerk, and settled with him weekly, or oftener, and paid over proceeds to him; never has known defendant in this matter since he sold out, and never knew or understood that he was concerned; never told *McKean*, or other person, that he, defendant, was concerned formerly, and before defendant sold out to the plaintiffs, he kept tavern, and *Thompson* lived with him, but never interfered with the business of staging; and since he sold out he has interfered and paid particular attention thereto; on the other hand, since the stages have been conducted by *Thompson*, the defendant has never interfered with the business, nor has this witness ever accounted to him, or paid over any thing to him, not considering him as having any thing to do therewith, but on the contrary, considering *Thompson* as the person interested therein, and his employer, and who employed him as his clerk, he, *Thompson*, acting as agent of his brother. The witness states that when the defendant was the owner, he was very particular, and constantly examined the stages, &c. before they went out; he has never done so since. Witness, *Thompson*, upon being asked what he meant by using the term interest, when speaking of his not disclosing his intention to establish stages when the contract was signed, says he has no recollection

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of using the word; he was not intimate with any of the gentlemen, except *Smith*, and not upon intimate terms with him, and it would therefore be improper; that he did not mean to convey the idea that he had any interest in concealing his intention; he could not have so meant, because he had that very morning, on his return from *Washington*, so informed the said *Smith*. And the said defendant further proved by *Stephen J. Thompson*, that the following bill was rendered to him, said *Thompson*, by defendant: *Mr. S. J. Thompson to John H. Barney.*

“March 17, 1827, cash paid *Wm. C. Gent*, for hay, \$88 50; April 30, rent of stables, interest and board to this day, \$800; July 31, rent of dwelling, stables, &c. &c. three months, ending this day, \$250; Oct. 31, rent as above, \$250—\$1388 50.”

1827, January 15 to 1st May, by various items of cash, \$537 66; 12th May, 1827, to 17th November, by various items of cash, \$665 55.

Due J. H. B. \$185 29.”

And then proved, that *William C. Gent*, mentioned in the first item of the last account referred to, was largely indebted to the *Levy Court*, and *Mr. B.* was treasurer of that court: that the said *Gent* paid at different times to said *B.* whose duty it was, as treasurer, to settle with him, various sums of money, who opened the account against said *Gent*, and recently closed it, by delivering *Gent's* note to the clerk of the now commissioners of the county, for the balance: and upon the cross examination by the plaintiffs counsel, of *Stephen J. Thompson*, he was required to produce all the quarterly settlements with defendant: he went to his office and returned, and produced the accounts offered in evidence by the defendant, and stated that he had looked for the other accounts: that the one now produced, was the only one he had been able to get—the others were at his house. Whereupon the plaintiffs counsel asked him whether the other accounts were headed in the same manner, to which the witness answered that he believed that

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was the only account so headed; that the others, he believed, were all headed *J. Thompson*, agent.

The defendant further offered evidence by *Stephen J. Thompson*, that the settlement made with the parties interested in the *Union* line to *Philadelphia*, for the winter of 1825 and 1826, was made at *Elkton*, between the parties concerned in said stages: that *Samuel McDonald* was not then and there present, and that such settlement was so made, with a recognition of said *Thompson's* interest, as agent, as aforesaid, and not as recognizing in *Mr. B.* an interest in any part of the said line from *Baltimore* to *Philadelphia*: that said *Thompson* assisted at said settlement, and said *B.* did not so assist. The defendant also proved, that *William Thompson*, brother of *Stephen J. Thompson*, is a rich man, and is doing an active business in the *West Indies*, but is now in the *United States*: and the defendant proved by *George Beltzhoover*, that while there was no opposition, he, as agent, bought of the plaintiffs half a stage and four horses, one in ill health and at the purchaser's risk, and which died before he received him, for the sum of \$2,000, which purchase gave him an interest in the line, and with a view to get them to stop at his tavern house. After the defendant closed his case, the plaintiffs called a witness, who proved that being written for by *Grant*, one of the witnesses of the defendant before mentioned, to come and drive for *Thompson*, he called upon said *Grant*, and told him he would not drive for *Thompson*. *Grant* then told him, you know what sort of a gentleman *B.* is; *Thompson* and I are only agents for defendant; that witness then replied he knew what sort of a man *B.* was, and if that were the case, he, the witness, would rather drive for *B.* than any other of the owners, but he doubted whether he would employ him, as witness had sued *B.* And also proved by said witness, that the defendant told *Thompson* to settle with witness, if he would drive for him, *Thompson*. Whereupon the plaintiffs, by their counsel, prayed the Court to direct the jury,

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First. If the jury shall find from the evidence, that a line of stages from *Baltimore* to *Washington*, was established about the month of October, 1825, in opposition to the line of stages on the said road, then owned by the said plaintiffs, and that the said line of stages, so established in opposition as aforesaid, continued to run in opposition to the aforesaid line of the plaintiffs until the institution of this suit: and if the jury shall also find that the defendant in this cause furnished the owners of the said opposition line with credit, money, horses, or any other means, in order the better to enable the owner or owners of the said opposition line to establish it and carry it on, and by reason of which means, so furnished, the said owners were the better enabled to establish it and carry it on, that then the plaintiffs are entitled to recover, notwithstanding the defendant may not own any of the horses, carriages, or other property employed in said opposition line.

Second. That by the contract on which this suit is brought, the defendant was bound not to assist in carrying on any line of stages, in opposition to the plaintiffs, on the road from *Baltimore* to *Washington*; and if the jury find the evidence that he did render assistance of any kind to the owners of a line of stages established on the said road in opposition to that of the plaintiffs, and that such assistance was rendered by him for the purpose of enabling the owners of the said opposition line the better to establish and carry it on; that the rendering of such assistance for such purpose, was a breach of the aforesaid contract, although the defendant may not have owned the aforesaid opposition line, or any part or portion thereof, or of the horses and stages employed thereon. Which directions the Court (ARCHER, Ch. J., HANSON and KELL, A. J.) refused to give, but directed the jury that there was no evidence in this cause to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the opposition line to carry it on, but that the horses and other means were sold by the

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defendant to said opposition line, if the jury believe the testimony in the cause; and that such sale—if the jury believe that the horses and other means were owned and left on hand of defendant, at the time of contract between plaintiff and defendant, was no violation of the contract on the part of the defendant; and furthermore, that the letting *Thompson* have two horses for and in consideration of the wintering of them, to be returned in the spring, if the jury should believe they were occasionally run in the opposition line, was no violation of the contract, unless the jury should believe the said horses were purchased by the defendant with the view of assisting the opposition line, and that defendant let *Thompson* have them for that purpose. Whereupon the plaintiffs excepted.

2d EXCEPTION. The evidence offered in the first bill of exception by plaintiffs and defendant, and which is to form a part of this bill of exception, having been given, the plaintiffs by their counsel prayed the Court to direct the jury upon the following prayers:

First. That if the jury find from the evidence that the defendant furnished the owners of the opposition line herein before mentioned, with two horses for the purpose of being used in the said opposition line of stages herein before mentioned, from September, 1825, until the spring following, for which the defendant was to pay nothing but the expenses of keeping them; and also that the defendant furnished the owners of the said opposition line with two other horses, three stages, and three setts of harness for \$1050, to be paid for when convenient, to a certain *Stephen J. Thompson*, for whose use and benefit the said opposition line was established; and if the jury also find that these means were furnished by the defendant as above mentioned, for the purpose of assisting in the establishment and support of the said opposition line; and that the said means, so furnished, did the better enable the owners thereof to establish and support the same; that then the plaintiffs are entitled to recover, notwithstanding the defendant was not an owner

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or part owner of the said opposition line, or of any part or portion thereof, or of the property employed therein.

Second. If the jury believe that *John H. Barney*, the defendant, lent *Stephen J. Thompson* three horses, for the purpose of being used in a line of stages in opposition to the plaintiffs, and which horses were so used, that then the plaintiffs are entitled to recover.

Third. If the jury shall believe that *Stephen J. Thompson*, after the 30th September, 1825, and before the institution of this suit, established and carried on a line of stages in opposition to the plaintiffs, and that *John H. Barney*, the defendant, hired to said *Thompson* stables, sold him carriages, horses and harness, for the purpose of being used and employed in such opposition line, then the plaintiffs are entitled to recover.

Fourth. If the jury shall find, from the testimony given in the trial of this action, that the defendant before the time of making the contract with the plaintiffs, set forth in the declaration, had been informed and knew at the time of making such contract, that it was the intention of *Stephen J. Thompson* to establish and carry on a line of stages between *Baltimore* and *Washington*, in opposition to the line owned by the plaintiffs on said road, and that the defendant afterwards furnished to the said *Thompson* such a portion of the means, advice and assistance necessary to establish and carry on such opposition line, as he could not otherwise have obtained, or without the aid of which the said *Thompson* could not have effected the establishment and carrying on of such opposition, the defendant knowing and intending that the means, advice and assistance furnished by him, would and should be so used by said *Thompson*, then the plaintiffs are entitled to recover.

Fifth. If the jury shall believe from the evidence, that the defendant, in making the sale of his horses, stages and harness to *Stephen J. Thompson*, and contracting with him for the compensation to be paid for the rent of stables and boarding of drivers, to be used in establishing and carrying

on a line of stages on the *Washington* road, in opposition to the plaintiffs, derived any benefit or advantage from the intended aid thereby to be afforded, in effecting the establishment, or of the carrying on of such opposition, then the defendant was concerned in such opposition, contrary to his agreement, and the plaintiffs are entitled to recover. Which several directions the Court refused to give. Whereupon the plaintiffs excepted.

The verdict and judgment being for the defendant, the plaintiffs appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN and STEPHEN, A. J.

Meredith and *Taney*, (Att'y. Gen'l. of Md.) for the appellants, contended, 1. That by the true construction of the agreement before mentioned, if *Barney* furnished the owners of the opposition line with money, credit, horses, or other means, for the purpose of enabling them the better to establish or carry on that line, and that such means did enable them the better to establish or carry on that line, that then he has broken his agreement, and the plaintiffs are entitled to recover. The defendant had no right to interfere in any way with the line of the plaintiffs. The object of the contract was to prevent his being concerned, or assisting in establishing a line of stages on the *Washington* road. Furnishing means or credit for such a purpose, was a violation of the contract. 9 *Massa. Rep.* 522, 524. The word "indirect," was introduced into the contract, to prevent the defendant co-operating with, or affording any assistance to the opposition line. The word "direct," would merely have prevented his having an interest in the line. The contract meant something more than merely to prohibit the defendant from being interested in the stages. The decision in 9 *Massa. Rep.* is applicable to this case. It did not turn upon the pleadings, but upon the contract, and in that case the stipulation was not that the defendant would not be concerned in the trade, but that he would

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have no interest in it; yet it was held that fitting out a vessel, though she was sold before she sailed, was a breach. The object was, to get rid of a rival in a limited trade, and here to get rid of one in a much more limited object. The fact that *Thompson* informed the plaintiff's that he would establish an opposition line, was the reason that induced them to insist on the stipulation restraining defendant. 2. If the Court should be of opinion that the first proposition cannot be maintained, then it is contended that if *Barney* furnished the owners of the opposition line with money, credit, or other means, for the purpose of enabling them to establish and carry on that line; and that the said owners could not have established it or carried it on without the means so furnished by *Barney*, that then he has broken his agreement, and the plaintiff is entitled to recover. 3. There was evidence offered on the part of the plaintiffs, *tending to prove* that *Barney* did furnish the owners of the opposition line with means, for the purpose of the better enabling them to establish or carry it on; and that they were thereby the better enabled to establish it and carry it on. 4. That there was evidence offered on the part of the plaintiffs, *tending to prove* that *Barney* did furnish them with means for the purpose of enabling them to establish and carry on the opposition line. *McElderry vs. Flannagan*, 1 *Harr. and Gill*, 320. *Fergusson vs. Tucker*, 2 *Harr. and Gill*, 189. *Drummond vs. Prestman*, 12 *Wheat*. 515. 1 *Stark. Evid.* 400. *Mason vs. Harrison & Boggs*, 5 *Harr. and Johns*. 480.

JOHNSON, and WILLIAMS, (District Attorney U. S.) for the appellee, upon the construction of the contract, contended that it was merely a stipulation that *Barney* would have no *interest* in any opposition line, not that he would not sell his horses, &c. to other persons, though he might in so dealing sell to persons engaged in the opposition line. There is proof that before the contract, that *Thompson* told one of the plaintiffs that he would run an opposition line on the

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road, there could not therefore have been any expectation on the part of the plaintiffs, that by buying defendant's interest they would get clear of all opposition, or that defendant's horses, &c. would remain unsold. In construing written contracts, you may look to the situation of the parties. 8 *Massa. Rep.* 214. 18 *Ib.* 332. The case cited from 9 *Massa. Rep.* by our opponents, was a demurrer to the plaintiff's replication, and the facts therein stated and those in the declaration, are admitted, except so far as they are contradicted by the plea. The replication charges that the ship was fitted out by the defendant, whose skilful competition it was the object of the contract to remove. If he had merely sold a vessel on hand at the time of the contract, without a cargo, for such a voyage, then it would be something like the case at bar; for the direction of the Court is, that if *Barney* merely sold carriages and horses on hand at the time, and known by the plaintiff to be on hand, that was no breach; a contract not to carry on a particular trade, cannot be broken by selling materials or goods on hand at the time, to any one who proposes to carry on such a trade. 2. Was there any evidence which entitled the plaintiff to recover. The Court do not say that the plaintiffs evidence does not entitle them to recover, but if the evidence on both sides is believed, then they cannot recover. The jury could not find for the plaintiffs, without disbelieving the defendant's proof, it being positive, but they might have found for defendant, without disbelieving the plaintiffs proof, because there was no conflict between the circumstances proved by them, and the *absence of any interest* in the defendant. All the plaintiffs proof must be true, consistently with the defendant's evidence. The plaintiffs proof was but presumptive, and could only be good in the absence of positive proof. If, however, there is a conflict in the proof, the plaintiffs were not excluded from the jury. The direction of the Court left them at liberty to show that *Thompson*, defendant's witness, was not to be believed. They cited 4 *Cranch*, 62. 6 *ib.* 226. 5 *Massa.* 10.

BUCHANAN, Ch. J., delivered the opinion of the Court.

This was an action of trespass on the case, for the alleged violation by the defendant of a contract, or engagement by him, with the appellants, dated at *Baltimore*, the 30th of September, 1825, which is in these terms: "I hereby acknowledge to have received of *Messrs. David Barnum & Co.*, stage proprietors on the *Washington* and *Baltimore* road, \$9,000, as a full compensation for the within named four teams and two coaches; and I bind myself to withdraw all my pretensions to any part of the said road, and I herewith deliver to the said company, the teams as they are at this instant on the road between this place and *Washington*, and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them." This is written on the back of a letter from the defendant to one of the appellants, containing proposals of sale, to which it refers by the expressions, "for the within named four teams and coaches."

It appears that an opposition line of stages was very soon afterwards set up: upon which the question arose, whether the circumstances under which that opposition line was set up and carried on, amounted to a violation by the defendant of his contract. A great deal of parol evidence was offered at the trial, on both sides, and the case comes up on two bills of exception, taken to the refusal of the Court to give the instructions prayed for by counsel for the appellants, and to the direction that was given to the jury in reference to the testimony. The direction given to the jury, is in these words: "that there was no evidence in this cause, to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the owners of the opposition line to carry it on, but that the horses and other means were *sold* by defendant to said opposition line, if the jury believe the testimony in the cause; and that such sale, if the jury believe that the horses and other means were owned and left on the hands of defendant, at the time of the contract between

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plaintiffs and defendant, was no violation of the contract on the part of the defendant; and furthermore, that the letting *Thompson* have two horses, for and in consideration of the wintering of them, to be returned in the spring,—if the jury should believe the evidence, although the jury should believe they were occasionally run in the opposition line, was no violation of the contract, unless the jury should believe the said horses were purchased by defendant, with the view of assisting the opposition line, and that defendant let *Thompson* have them for that purpose.” This involves the construction of the contract, and also the question whether the direction of the Court amounted to an invasion of the province of the jury. The whole of the evidence being set out in the first bill of exception, it is unnecessary here to state it particularly.

In construing this contract, we must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. The motive, then, of the appellants, who were stage proprietors on the *Washington* and *Baltimore* road, was manifestly to become sole proprietors of all the stages on that road, and to shut out all opposition; and to effect that object, the purchase of the interest of the defendant, in a line of stages then running on the same road, was made. And it cannot be believed, that with such an object in view, they would have made the purchase with any other understanding than that the defendant should, in good faith, not only not become interested in any opposition line, but that he would not in any manner aid or become instrumental in the setting up or carrying on an opposition line. If that was not the understanding and intention, the purchase was a very wild and unmeaning one, as there were many ways in which the defendant, without being concerned in interest, might be concerned or engaged in promoting and encouraging the setting up and carrying on an opposition line, to their prejudice, and to the total loss of the amount given for the immediate interest bought out. The purchase was

not made for the purpose of throwing away, or giving to the defendant, \$9,000, which would be the effect if he was at liberty and disposed so to act, immediately to lend his aid and patronage to the establishment of an opposition. But it was made for the purpose of shutting out all opposition, and securing to themselves the exclusive advantages of the road, so far at least as related in any manner to the defendant; to effect which object the concluding stipulation, "and further pledge myself not to be concerned, direct or indirect, in any line of stages in opposition to them," would seem to have been introduced. The word *indirect* seems to us to have been used for the special purpose of guarding against any kind of interference by the defendant, in aiding or in any manner promoting, the establishment of, or carrying on, any opposition. Our construction therefore of the contract is, that the defendant could not, without violating the contract, set up or carry on, or knowingly aid or intermeddle, or in any way whatsoever, directly or indirectly, be concerned in setting up or carrying on any line of stages on that road, in opposition to the appellants; he was bought out for the purpose of being put entirely out of their way. Under any other construction, the word *indirect* would lose its office, and the object of the contract be defeated. Suppose the defendant immediately after the contract, had given all the horses and stages he owned to a son, for the express purpose of setting up an opposition line to the appellants, or (under feelings of resentment for some cause or other) to a stranger, for the same purpose, and with a view of injuring the appellants, or had given a premium to any one to set up such a line of opposition, can it be doubted that in either case he would have broken his contract. He had the same right to sell any horses or stages that he owned at the time of the contract, that he had to sell any other property to whom he pleased, without intending that they should, or knowing that they were to be put to the purpose of setting up a line of opposition stages. But he could not have sold them to any person, for the express purpose of

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being so used, without violating his contract; nor had he under his contract any right to loan or hire any of his horses to the owners of the opposition line, for the purpose of being used on such line. And in the case of his hiring or lending any of his horses to the owners of the opposition line, for the purpose of being used on such line, we do not perceive that it would make any difference whether they had belonged to him before, or whether they were purchased by him for that purpose, the breach of the contract consisting in his assisting the opposition line by letting the owners have them for that purpose.

It is our opinion, therefore, that if the defendant did furnish the owners of the opposition line with money, credit, or other means, for the purpose of enabling them to establish and carry on that line; and that the means so furnished, did enable them to establish and carry it on; and that they could not have established or carried it on without such means, so furnished by the defendant; or that he did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the better to establish or carry on that line; and that such means did enable them the better to establish or carry it on, the appellants were entitled to recover, and that there was legal and competent evidence in the cause, tending to prove either of those propositions, which ought to have been submitted to the jury for their decision upon its effect. The general rule being, that where there is any legal admissible evidence, tending to prove the issue, the effect of that evidence is solely for the consideration of the jury. Though we have said the testimony taken at the trial, ought to have been left to the jury, as tending to prove the issue on the part of the appellants, we wish to be distinctly understood as intending to express no opinion touching the effect of that evidence, further than that it was fit to be left to the jury for their consideration, to pass for whatever it was worth, and have therefore intentionally avoided commenting on any part of it, to show in what it tended to prove the issue, or any

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material fact in the cause. There seems to be an impression at the bar, that this Court has held the measure and quantity of proof to be a question of law, and the case of *Davis vs. Davis, et al.* 7 *Harr. and Johns.* 36, is commonly relied upon in support of that doctrine. We by no means mean to shake the authority of that case, but think it has been misunderstood. When there is no evidence applicable to the issue, or tending to prove any material fact, a total failure of evidence, the Court will direct the jury accordingly; and that we conceive to be the doctrine of *Davis vs. Davis, et al.* The expressions used, are intended to be applicable to the facts of that case; and so applied, they are not, we apprehend, opposed to the principle here asserted, that if there be any evidence tending to the proof of the issue, however weak, it ought to be submitted to the consideration of the jury. Under this view of the subject, we dissent from the opinion of the Court below, on both bills of exception, and we think the direction of the Court, that there was no evidence in the cause to show that the defendant had furnished the opposition line with credit, money, horses, or other means, in order the better to enable the owners of that line to carry it on, was an invasion of the province of the jury, to whom that question ought, upon the evidence, to have been left.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

WILLIAM JESSOP vs. SAMUEL BROWN, Jr.—June, 1830.

Where at the time a sheriff under a *fi. fa.* levied upon personal and real property, pointed out by the plaintiff as the property of the defendant, a claim was made thereto by third persons, who denied the right of the sheriff to levy upon or sell the same, and threatened to sue him if he should sell the same; and the sheriff then informed the plaintiff that unless he would indemnify him, he would not sell. Upon motion made at the return term of the writ, (founded upon the foregoing facts, sustained by

affidavits and copies of deeds and mortgages from the defendant to the claimants, and proof of the plaintiff's refusal to indemnify the sheriff) the Court granted a rule absolute either to indemnify the sheriff, or permit him to enlarge the time of making his return, from term to term, until that was done; and again enlarged the time for making his return to the first day of the next term.

A *fiery facias* issued in this case, returnable in June term, 1829. At that term a motion was made on the part of the plaintiff, for a rule on the sheriff of *Anne Arundel* county, to whom the said writ was directed, to return the same, the said sheriff having failed so to do. The rule was granted, requiring the sheriff to make his return on the 5th day of July then next ensuing, but at a subsequent period, during term, the time was extended to the 1st day of this term.

Brewer, for the sheriff, now moved the Court for a rule on the plaintiff, to show cause why the above rule should not be enlarged to the next term, and why he should not indemnify the sheriff before the said writ should be returned. And he assigned the following reasons: "1. Because the greatest part of the property, both real and personal, on which the said *fiery facias* was levied, was conveyed to a certain *Rebecca Goodwin* and *Eliza Goodwin*, and a certain *Richard G. Stockett*, and the residue was claimed at the time of the levy, by *Samuel Brown*, father of the said defendant. And the said plaintiff who showed the said property, was then and there informed by the sheriff that he would not sell the said property, unless the said plaintiff would give him a sufficient indemnity, which the said plaintiff then and there repeatedly refused. 2. Because all the said property was claimed by the said *Rebecca* and *Eliza Goodwin* and *Samuel Brown*, who denied the right of the said sheriff to levy on and sell the same, and threatened to institute a suit against the said sheriff, if he should proceed to sell the same."

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Affidavits by the sheriff and his deputy were filed, and copies of a deed and mortgage from the said defendant to the above named *Rebecca* and *Eliza Goodwin*. The facts set forth in the reasons were supported by the affidavits. In support of the rule he referred to 1 *East*. 338. 3 *Bos. and Pul.* 288. 2 *Tids. Prac.* 928. 7 *Term Rep.* 174. *Sellon's Prac.* 527.

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In enlarging the rule in this case, the Court wish to be understood as laying down no general rule. Each case must depend upon its own circumstances; and here we think, upon the reasons and proofs, there is sufficient reason to interfere.

Rule on the plaintiff made absolute, and the rule on the sheriff enlarged to the first day of the next term.

STATE OF MARYLAND vs. LABAN WALSH.—*June, 1830.*

A final release under the insolvent laws of this State, obtained by a debtor to the State, after judgment rendered against him, will protect him from a *ca. sa.* on such judgment; and if arrested, the Court will discharge him on motion.

APPEAL from *Baltimore County Court*.

At March term, 1825, the State of Maryland recovered judgment in an action of *Debt*, against *Laban Walsh*, the appellee, who was a security in the bond of one of the collectors of the State tax, and in that character indebted to the State. On the 11th October, 1828, the appellee was reported to be entitled to his final discharge under the Insolvent Laws of the State, by the Commissioners of Insolvent debtors for the city and county of *Baltimore*, and on that day was accordingly discharged by *Baltimore County Court*. On the 23d March, 1829, the State sued out a writ of *capias ad satisfaciendum* on the aforesaid judgment,

and the appellee was arrested, and brought before *Baltimore* County Court for commitment. He thereupon moved the Court for his discharge from the custody of the sheriff, on the ground that he had applied for the benefit of the Insolvent Laws of Maryland, and obtained a final discharge since the rendition of the judgment aforesaid. And *Baltimore* County Court [ARCHER, C. J.] accordingly discharged him. The State appealed to this Court.

The cause was argued before BUCHANAN, Ch. J. EARLE, and STEPHEN, A. J.

Taney, (Atty. Genl.) and *Gill*, for the State, contended, that the insolvent laws of *Maryland* do not apply to the *State*. The *State* is not a creditor within their meaning; and the rights of the *State* against the persons of her debtors, are not restrained by them. They said that the insolvent laws of *Maryland* did not bar the *State* in the prosecution and recovery of her debts. The act of 1805, *ch.* 110, was the basis of the system, and when first enacted was a mere private act, for the relief of the persons mentioned in it. One of its provisions (Sect. 3,) required the debtor at the time of presenting his petition, to produce to the Court which was to grant the discharge, "the assent in writing of so many of his creditors, as have due to them the amount of two-thirds of the debts due by him at the time of his application" for relief. Foreign creditors not residing within the United States, or not having agents therein authorised to act in their behalf, are not to be considered as creditors within the meaning of the act. The 2d section required the Court, to which the application might be made, to direct personal notice of the application to be given to the creditors, or their agents, or public notice to be given where the debtor resides, and on the appearance of the creditor, or neglect to appear at the times and place appointed, the Court is to proceed with the consideration of the case. By the 9th section, creditors were au-

thorised to file allegations of fraud against the insolvent to vacate his discharge.

When the Legislature was making these various provisions requiring assent of creditors, and notice to creditors to be given, and authorising creditors to proceed against a fraudulent insolvent, it could not have escaped their attention, that no officer was empowered to act for the public—none entrusted to give the required assent to confer jurisdiction on the discharging court; none indicated to whom notice might be given, nor whose duty it was to take notice of the advertisement. Under these omissions in material and important particulars, essential to preserve the integrity of the system, to confer jurisdiction on the Court, and guard the rights of creditors, and consequently directly affecting the debts of the public, and leaving the *State*, in her character of creditor, entirely unrepresented, it is insisted that she is not a creditor within the spirit and meaning of the original system, and was not intended to be barred by it. There is no power short of the Legislature which can release a public debt; and when that authority, acting in the ordinary course of legislation, passes a law releasing debts generally, without any particular mention of the *State*, a question arises upon a fair construction of the whole law, whether the *State's* debts were intended to be released. If as many reasons tending to form an exception in favor of an individual could be found, it would be contended that a discharge under this system, would be no discharge of the claim of such individual.

It is true that the authority to discharge, conferred upon the Court, is in its term broad enough to include the *State's* debt. The Court has power to order that the debtor shall be discharged, “as well from all debts, covenants, contracts, promises and agreements due from, or owing, or contracted in his individual, as also in a co-partnership capacity, by him,” before the time of his application, “provided that no person who has been guilty of a breach of the law, and hath been fined, or is liable to be fined for such breach, shall be

discharged from the payment of any fine incurred for any breach of the laws of this *State*," but the question still remains what creditors shall lose their rights, what debts are to be barred? Answer, all debts due to persons who have a capacity and right to act under, and be affected by the conditions and principles upon which the discharge is to be obtained. The conditions and principles upon which the discharge is obtained, constitute the consideration upon which it is granted—the inquiry is therefore always open, as to what class of creditors is not affected by it. No argument can be drawn from the proviso, which is not an exception, nor in the nature of an exception; if the proviso had not been introduced into the act, a discharge from debts and covenants would not have released judgments for fines and breaches of the criminal code. It must therefore be considered as introduced *ex abundante cautela*.

It is true that the act of 1805, has, since its passage, been converted into a general system, by a legislative declaration that all insolvents may avail themselves of it, yet that does not change its construction in relation to creditors. They contended that a "law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the legislative mind, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act;" that this was an undisputed rule in the construction and application of statutes, and one which applied directly to the act in question, when set up as a bar to a demand of the State. That the details of the insolvent debtors' act restrain its general expressions, and confine its application to those creditors only who could comply with its provisions.

It is contended, moreover, that the State has a preference over all claims, except liens, upon the insolvent debtors' estate. If she is to be considered as embraced within the term creditor, instead of a priority she would have to come in with other creditors for a distributive share. This would

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produce a loss to the public not contemplated by the legislature.

They cited *acts of 1805, ch. 110, sec. 2. 1807, ch. 150, sec. 4. 1812, ch. 77, sec. 2, 5. Cox Dig. 638. Pennington vs. Coxe, 2 Cranch, 33, 52. State vs. Stump and Gilpin, 2 Harr. and McHen. 174. Murray vs. Ridley, admr. 3 Harr. and McHen. 177. Wood vs. Repold, 3 Harr. and Johns. 127. State vs. Rogers and wife, 2 Harr. and McHen. 198. Contee vs. Chews, ex'tr. 1 Harr. and Johns. 417. Kip vs. Bank New York, 10 Johns. 63. Kennedy vs. Strong, 10 Johns. 289. Act of 1792, ch. 51.*

No counsel appeared for the appellee.

JUDGMENT AFFIRMED.

BARGER, *et ux.* *Ex'rs of ATHEY vs. COLLINS.*—June, 1830.

A proved a settlement with C on the 1st March, 1820, shewing a balance due him of \$1013, for building certain houses. C, under notice of set-off, established payments to the amount of \$195; and to shew that A had no separate right of action, proved that he was a partner in two firms, one of which furnished the bricks, and the other did the brick work of the houses, and both of which rendered accounts in 1818 and 19, amounting to \$2850, for their respective claims. He also proved various receipts, during the same years, of the individual partners of those firms for payments made to them—some on account of such buildings generally—some for bricks, — some for brick work, amounting in the whole to \$1310. A then offered to prove by one of his former partners, that his firm was dissolved about the close of 1819, and its debts assigned to A. The county court admitted the witness, and held that the settlement in 1820, was evidence of C's knowledge of the dissolution of that firm, and the transfer of its debts to A; but no evidence of the dissolution of the other firm being given, that court also decided that the whole evidence did not furnish competent proof of any balance being due to A individually. Upon appeal, held that this was a question of fact for the jury.

APPEAL from *Baltimore County Court.*

Action of *Assumpsit.* The declaration contained counts for work and labor, and materials found and provided, &c. For money laid out and expended; and on an *insimul com-*

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putassent. The defendant, (the appellee,) gave notice of a set-off, and pleaded *non-assumpsit*, and issue was joined.

At the trial the plaintiffs, (now appellants,) to support the issue on their part, and for the purpose of shewing that the defendant was indebted to the testator of the plaintiffs, offered in evidence the following paper, admitted to be in the hand-writing of the defendant:

("No. 1.) Settlement of accounts this 1st day of March, 1820, with *Walter F. Athey*, for bricks and brick work, and I do hereby acknowledge the following balance to be correct:

Balance on Mr. <i>Higinbotham's</i> house, <i>Franklin</i>	
street, - - - -	\$10 00
Balance on six buildings, <i>north Charles</i> street,	964 01
On my account, - - - - -	39 61
	\$1013 62

Balance of one thousand and thirteen dollars and sixty-two cents.

James W. Collins."

Whereupon the defendant proved, under the notice of set-off, that he had paid for the use of *Athey* in his life-time, the following sums, to wit, \$20, \$30, \$145; and for the purpose of shewing that the bricks furnished for the six buildings in *N. Charles* street, as mentioned in the above paper offered in evidence by the plaintiffs, were furnished by *Athey* and a certain *George Shoemaker*, as co-partners in the brick making business, under the firm of *George Shoemaker and Co.* and that the brick work done in the six buildings was done by the said *Athey* and a certain *Deter Barger*, as co-partners in the brick-laying business, under the firm of *W. F. Athey and D. Barger*, and that neither the bricks were furnished, nor any of the brick work done, by *Athey* in his individual character; the defendant produced and read in evidence the following accounts, which were admitted to be in the hand-writing of *Athey*:

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“No. 2. Mr. *James W. Collins* and others, for six houses in *N. Charles street*, to *George Shoemaker & Co.*

1818, Sep. To 348,500 bricks, at \$8 pr. th. 2788 00

To 33,000 front bricks, at \$15 pr. th. 495 00

To 150 long arch bricks, at \$7 pr. hun. 10 50

To 110 rubbing bricks, at \$7 pr. th. 7 70

\$3301 20

Cr. By 2000 front brick, at 15

dollars pr. th. - - \$30 00

Cr. By 450 common brick, at 8

dollars pr. th. - - 5 20

Cr. By cash at sundry times, 2500 00

2535 20

\$766 00

To *W. F. Athey, and D. Barger,*

To laying 379,000 brick, at 3 50 pr. th. 1326 50

To laying 16,500 old brick, at 3 50 pr.

th. - - - - - 57 75

To pointing out roof of Boehmes'

house, - - - - - 1 00

To poles, ropes, filing and pencil-

ing front, - - - - - 50 00

1435 25

Cr. By mortar, at sundry times, 3 00

\$1432 25

776 00

Balance, - - - - - \$2198 25

Turner Morehead's bill of dry

goods, - - - - - 275 75

\$1922 50''

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“No. 3. Mr. *James W. Collins* and others, to *Geo Shoemaker & Co.*

1819, Apl. 17.	To 1500 paving bricks, at \$11 pr. th.	16 50
	To 6,500 front bricks, at \$15 pr th.	97 50
Aug. 16.	To 59,000 common bricks, at \$8	
	pr. th. - - - - -	472 00
	To 17,935 paving bricks, at 9 50	
	pr. th. - - - - -	170 38
		\$756 38

To *W. F. Athey and D. Barger,*

	To laying 64,000 bricks, at	
	3 50 pr. th. - - -	224 00
Aug. 16.	To paving 505 yards back	
	and front, at 15 cts pr. yd.	75 75
	To digging for pavement	
	and back wall, - - -	3 00
	To building five cake ovens,	
	at 2 dollars each, extra,	10 00
		\$312 75

Cr. By cash, \$128 50

Cr. By 390 common bricks,
at 8 dollars pr. th. 3 12

Cr. By 326 paving brick,
at 9 50 - - - 3 09½

Cr. By 403 front brick, at
15 pr. th. - - - 6 04½

Cr. mortar, at sundry times, 1 17½

Cr. By 2¼ bushels lime, at
40 cts. - - - 90

—————\$142 83½

\$169 92½

To 4 bushels lime got of

Sinclair, at 40 cts. - - - 1 60

\$171 52½”

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And for the purpose of shewing, that when money was paid to either of said parties on account of bricks or of brick work as aforesaid, the respective party receiving the same gave receipts in his individual name; the defendant further gave in evidence the following receipts, which were all admitted to be in the hand-writing of the several parties whose names are signed thereto.

“No. 4. *Baltimore*, June the 30th, 1818, Received of *James W. Collins*, \$200 on acc. of six buildings.

Walter F. Athey.

Baltimore, July 9th, 1818, Received of *James W. Collins*, \$500 on acc.

Walter F. Athey.

“No. 5, *Baltimore*, July 17, 1818, Received of *James W. Collins*, \$130 on acc. of brick delivered for the six buildings on *North Charles street*.

George Shoemaker.

“No. 6. *Baltimore*, August the 15th, 1818, Received of *James W. Collins*, \$50 on acc. brick work on the six buildings *N. Charles street*.

D. Barger.

“No. 7. *Baltimore*, July the 31st, 1818, Received of *James W. Collins*, \$150 on acc. brick delivered for the six buildings on *North Charles street*.

George Shoemaker.

“*Baltimore*, July the 25th, 1818, Received of *James W. Collins*, \$70 on acc. of brick work, and on the first day of August \$70. \$140.

Deter Barger.

“*Baltimore*, August 17, 1818, Received of *James W. Collins*, \$120 on acc. of brick delivered at the six buildings *North Charles street*.

George Shoemaker.

“*Baltimore*, August the 8th, 1818, Received of *James W. Collins*, \$70 on acc. of brick work on the six buildings on *North Charles street*.

Deter Barger.

And the defendant also offered in evidence the following account, and receipt thereon :

“*Mr. William Robinson to W. F. Athey, and D. Barger,*

Barger, et ux. Ex'rs of Athey vs. Collins.—1830.

1819, June.	To digging for pavement, front and rear,	1 50
	To setting stone steps and mending wall,	3 50
	To finding some mortar for fire place,	25
	To repairing wall of smoke house,	75
	To laying 3500 bricks in pavements,	
	&c. at 3 50,	- - - - 10 50

\$16 50

Cr. By laying 800 bricks, at 3 50 pr. th. 2 80

\$13 70

1820, Feby. 28. Received a note on demand for the above.

W. F. Athey, & D. Barger."

To George Shoemaker, & Co.

June 28.	To 500 front brick, at \$15 pr. th.	7 50
	To 3000 paving brick, at \$10 pr. th.	30 00

\$37 50

Cr. By 250 brick, at \$8 pr. th. - - 2 00

\$35 50

1820, Feby. 28. Received a note on demand for the above.

Geo. Shoemaker, & Co.

Admitted to be in the hand-writing of the said *Walter F. Athey*.

And also proved by the said *William Robinson*, that at the time of the payment thereof, to wit, on the 28th of February, 1820, he had not heard of any dissolution of the said co-partnership of *George Shoemaker & Co.* and did not hear of any dissolution thereof until some time afterwards. And also gave in evidence the following account, and receipt thereon:

"Mr. *Charles L. Boehme* to *W. F. Athey & D. Barger*.

1818, May 15.	To repairing pavement at the alley,	\$1 00
	To 20 paving brick, at \$11,	- 22
Sep. 26.	To filing and penciling front,	12 00

\$13 22

Barger, *et ux.* *Ex'rs of Athey vs. Collins.*—1830.

Received payment in full of the above, 13th October, 1820.

W. F. Athey & D. Barger."

Also admitted to be in the hand-writing of the said *Walter F. Athey*; and also proved by *Charles L. Boehme*, that at the time of the payment thereof, to wit, in December, 1820, he had not heard of any dissolution of the partnership of the said *Athey & Barger*.

The plaintiffs then further gave evidence by the said *George Shoemaker*, that the co-partnership formerly existing between him and the said *Athey*, was dissolved about the beginning of December, 1819, and that in a short time thereafter, and before the 1st of March, 1820, he, the witness, assigned, for a valuable consideration, all his right and interest in said co-partnership concern, to the said *Athey*; that the said co-partnership was not indebted to any person at the time of such assignment; and that during the continuance of the said co-partnership in the years 1818, and 1819, they furnished to the defendant for the aforesaid six buildings, between 500,000 and 600,000 bricks, at various prices, from 8 to 15 dollars per thousand.

The defendant, by his counsel, then objected to the admissibility of the said *George Shoemaker* as a witness, to prove either the dissolution of the co-partnership of *George Shoemaker and Co.* in December, 1819, or that there was an assignment of all his interest in the claims of the said co-partnership by the witness, to the said *Athey*, or that there were no debts due from the said co-partnership at the time of such assignment; and also objected to the admissibility of the paper herein first given in evidence by the plaintiffs, as evidence of the knowledge by the defendant of the dissolution of the co-partnership of *George Shoemaker and Co.* and of defendant's knowledge of an assignment of all witness's interest in the claims of said co-partnership, to the said *Athey*, by the said *Shoemaker*. But the Court overruled all the aforesaid objections. Thereupon

Barger, et ux. Ex'rs of Athey vs. Collins.—1830.

the defendant, by his counsel, moved the Court for their opinion and direction to the jury, that upon all the foregoing evidence the plaintiffs are not entitled to recover in this action, because said evidence does not show any dissolution of the co-partnership of *W. F. Athey* and *D. Barger*, in the brick-laying business, or any assignment of its claims, or any knowledge thereof by the defendant; and because the whole of said evidence does not furnish legal or competent proof to go to the jury, of any balance due from the defendant to the said *Athey*, in his life-time, or, if of any balance, not of greater amount than the aforesaid set-off, proved as aforesaid, upon which this action can be maintained; which opinion and direction the Court, (ARCHER, Ch. J. and KELL, A. J. gave.) The plaintiffs excepted, and the verdict and judgment being for the defendant, the plaintiffs appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and STEPHEN, J.

Moale, and *S. I. Donaldson*, for the appellants, contended, 1. That there was evidence in the cause proper to be submitted to the jury, from which they might infer the dissolution of the partnership between *Barger*, and plaintiffs testator, and a transfer of *Barger's* interest to *Athey* in the same. 2. That if there was no evidence of dissolution of the partnership between *Barger*, and the testator of the plaintiffs, yet plaintiffs were entitled to recover whatever sum might be due from the defendant, to *Shoemaker* and *Athey*, there being proof of the dissolution of the last mentioned partnership, and of the assignment of *Shoemaker's* interest therein to the plaintiff's testator. 3. That the evidence in the cause furnished legal and competent proof to go to the jury, of a balance due from the defendant to the plaintiff's testator, greater in amount than the set-off proved by the defendant in this action, of the weight of which evidence the jury were the proper judges.

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On the first point they cited *Davis vs. Davis*, 7 *Harr. and Johns.* 37. *Barger vs. Collins*, *ib.* 219. *Allstan vs. Contee*, 4 *Harr. and Johns.* 352. On the third point they referred to *Laidlaw vs. Organ*, 2 *Wheat.* 182.

Williams, (District Att'y U. S.) for the appellee. 1. The settlement of March, 1820, upon which the plaintiffs rely, was founded on transactions admitted to be of a partnership character. It is not denied, that there was proof of a dissolution of the partnership between *Shoemaker* and *Athey*, and the defendant's prayer does not raise that question—the question presented is, was there evidence of a dissolution between *Barger* and *Athey*, and that the claim due that firm, was assigned to *Athey*. That this was known to defendant, and that with such knowledge he promised to pay—a promise to pay one of the partners a partnership debt, is not *per se* evidence of a dissolution and assignment. *Allstan vs. Contee*, 4 *Harr. and Johns.* 351. *Onion vs. Paul*, 1 *Harr. and Johns*, 114. 2. The accounts relied on, show, that a sum of money was due from the defendant, for bricks furnished, and for brick work, but there is no data by which it can be ascertained how much is due for each, and therefore the jury had no rule by which they could have found a verdict. *Davis vs. Davis*, 7 *Harr. and Johns.* 36. *Fergusson vs. Tucker*, 2 *Harr. and Gill*, 189. *Bell vs. Morrison*, 1 *Peters*, S. C. R. 366. 1 *Petersdorf*, 157, *Brazier vs. Clap*, 5 *Massa. Rep.* 10. 2 *Harr. Index*, 89.

EARLE, J. delivered the opinion of the Court.

The Court below delivered an opinion and directed the jury, in this case, that upon all the evidence in the cause, the plaintiffs were not entitled to recover, because such evidence did not show any dissolution of the partnership between *Athey* and *Barger*, in the bricklaying business, or any assignment of its claims, or any knowledge thereof by *Collins*, the defendant; and because the whole of the said evidence, did not furnish legal, or competent proof to go to

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the jury of any balance due from the defendant to *Athey*, in his life-time, or if any balance, not of greater amount than the set-off proved by him, upon which the action could be maintained. If the Court were right as to the dissolution of the partnership between *Athey* and *Barger*, they were clearly in error as to the remaining part of the direction. The accounts of 1818, and 1819, produced by the defendant in the hand-writing of *Athey*, became evidence in behalf of his estate, and it may be, that by their assistance, the plaintiffs might have been able to separate the debt due to *Shoemaker* and *Athey*, from the debt due to *Athey* and *Barger*, and thereby to show what proportion of the large item of \$964,01, in the settled account of the 1st of March, 1820, belonged to the former partnership. For this, under the evidence given, added to the first and third items of the account, which were undisputed, they might have been entitled to a verdict, subject to a deduction of the sum of the set-off, which was also proved. We do not pretend to say, that from this source, the plaintiffs would have succeeded to establish this part of their demand against the defendant. This point the jury alone would have the right to decide; and that the plaintiffs were deprived of the use of this proof, by the directions of the Court.

All we mean to signify is, that the accounts of 1818 and 1819, might have been used for this purpose by the plaintiffs, and that it should have been left to them to make the attempt, if they had seen proper to do so. We intend alone to say that those accounts were legal, and competent proof to go to the jury, of the balance due from the defendant to *Athey* in his life-time. The judgment must be reversed, and the case sent back on a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

GWYNN vs. THOMAS—June, 1830.

G and T were seized in fee, as tenants in common, of a tract of land called the *Valley of Owen*. T contracted with G for the purchase of his moiety and paid the purchase money, upon which G executed and delivered to T, a deed for "all that one equal undivided half part of a tract of land called the *Valley of Owen*, which was sold by G to T (and which at the instance of the said T to secure the payment of the purchase money to M, G had conveyed to M by the name of *Glen Owen*, and the said purchase money being fully paid to M, the said M by deed, has this day conveyed to said T) together with all the advantages and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title and interest whatsoever, at law and in equity of the said G, of, in, and to the same." This deed also contained a covenant for further assurance. T filed his bill for further assurance, alleging that his deed did not convey to him a clear and undisputed title to the tract called the *Valley of Owen*, with all the advantages incident thereto, and as the same might be enjoyed under the original patent thereof. Held that this was a valid deed to pass to complainant all the right of G to a moiety of the tract of land called *Valley of Owen*.

APPEAL from the Court of Chancery.

The bill of the complainant, *Allen Thomas*, (the present appellee,) which was filed on the 3d of July, 1826, stated, that *William Gwynn*, (the appellant,) and the complainant, were entitled to a tract of land lying in *Anne Arundel* county, called "*The Valley of Owen*," as tenants in common, and being so entitled, the complainant for the purpose of acquiring a title to the whole tract in severalty, contracted with the said *Gwynn* for the purchase of his moiety of said tract, for a large sum of money. That the complainant hath since paid the whole purchase money, and that said *Gwynn*, in colorable execution of his contract, on the 16th February, 1826, executed and delivered to a friend of complainant, acting in his behalf, a deed, a copy of which is exhibited, marked A, which said deed, complainant alleges, does not convey to him a clear and undisputed title to the said tract, called "*The Valley of Owen*," with all the advantages incident thereto, and as the same might be enjoyed under the *original patent thereof*. That when apprised of

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the defect in the conveyance so executed, the complainant caused application to be made to the said *Gwynn* for another conveyance, which should more perfectly execute the contract between him and complainant, but that said *Gwynn* refuses to make, or execute any other conveyance, though the deed already executed and exhibited, contains a clause for further assurance. *Prayer*, that the said *Gwynn* may be decreed to convey to complainant, the said tract called "*The Valley of Owen*," by a deed to be prepared under the direction of the Court of Chancery, and for general relief. *Exhibit A*, is the deed from the appellee to the appellant, bearing date on the 16th day of February, 1826, whereby, in consideration of the sum of \$4200, paid by the appellee to the appellant, through the *Mechanics' Bank of Baltimore*, the appellant conveyed to the appellee in fee simple, the premises as described in the opinion of this Court.

The *answer* of *Gwynn* stated, that the whole tract called "*The Valley of Owen*," was conveyed to him by certain trustees appointed by the Court of Chancery, and of whom he had purchased, by deed bearing date on the 11th of February, 1814, an authenticated copy of which deed is exhibited with the answer. That, whilst the title to the whole tract was so vested in him, he, on the 9th of November, 1816, obtained a special warrant of resurvey, on the said tract called "*The Valley of Owen*," which was executed on the 24th of October, 1817; that whilst the surveyor was employed in executing the said warrant, the defendant being desirous of settling and quieting certain doubts, which existed as to the true location of the third line of the said tract, entered into an agreement, on the said 27th October, 1817, with the owners, or persons supposed to own lands binding on said line, to wit, *George Ellicott* and others, to adjust and fix the same; which agreement was reduced to writing, and signed by the respective parties concerned, and the said line was accordingly so adjusted, and was referred to and described by the surveyor in his certificate,

made in pursuance of the said warrant, and also in the patent, issued on the said certificate, so resurveyed by the name of "*Glen Owen*," as appears by the said patent, which bears date on the first of February, 1819, a copy of which is exhibited, with the answer. The answer further states, that the defendant purchased the said tract from the said trustees, on joint account, with one *John Conrad*, of *Philadelphia*, who was to have a joint and equal interest with him, and who was to pay one-half of the purchase money; that after the said *Conrad* had paid a portion of his moiety of the said purchase money, his interest in the said land, was conveyed to other persons, by whom the residue of said *Conrad's* moiety was paid, and that subsequently the said moiety of the said *Conrad* became mortgaged on the 15th of October, 1819, to a certain *Henry Thompson* and *Talbot Jones*, and others, who filed a bill on the said mortgage, and on the 27th of July, 1820, a decree was passed for the sale of the said premises, and this defendant was appointed trustee for the purpose of selling the same, as by the proceedings in said cause will appear; that the defendant, in his advertisement of sale, under said decree, described the said land, as one undivided moiety of a tract called "*Glen Owen*," the name given to it on making the re-survey, and that the complainant was the highest bidder, and purchaser of the same at said sale, at \$16 per acre, and by the name of "*Glen Owen*," as will appear by a written acknowledgment of such purchase, signed by the complainant, herewith produced and exhibited; that in his report of the sale so made to the Chancellor, this defendant stated that he had sold the same to the complainant, as an undivided moiety of a tract of land called *The Valley of Owen*, and lately resurveyed by the name of "*Glen Owen*," and that the complainant having complied with the terms, this defendant on the 10th of March, 1823, conveyed the same to him accordingly; that on or about the 19th October, 1821, this defendant mortgaged his undivided half of the said tract of land by the name of "*Glen Owen*," to the Pre-

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sident and Directors of the *Mechanics' Bank of Baltimore*, and that after it was so mortgaged, and after the complainant had purchased the other undivided moiety as aforesaid, that is to say, in February, 1822, the defendant agreed to sell his undivided moiety of said land to the complainant, the defendant having previously ascertained that the *Mechanics' Bank* would confirm the sale, whereupon the complainant was authorised, and did take possession of the same. The defendant admits that he contracted to sell the said land by whatever name the same might be called, but insists that such contract and sale was made with full knowledge on the part of the complainant, of the resurvey, and the before mentioned agreement in writing, relative to the adjustment of one of the lines of said tract. The answer further states, that upon the payment of the mortgage debt to the said *Mechanics' Bank*, which debt was the consideration to be paid by the complainant to him for the said land, he, the defendant, at the request of the complainant, executed the deed referred to, and exhibited with the bill; and he submits whether he ought, under the circumstances, to make any other or further deed in the premises.

The exhibits filed with the answer it is not deemed necessary to set out, nor is it necessary to refer to the proof taken under the commissions which issued in the cause.

The general replication was filed to the answer.

Bland, Chancellor, (March term, 1827.)

It appears that the defendant, on the 11th of February, 1814, as a purchaser under decree of this Court, obtained a deed, and thus became legally seized in fee simple of the whole of a tract of land called "*The Valley of Owen*." That of this tract, the legal title of which was thus vested in him, a certain *John Conrad*, was by agreement, entitled to one undivided moiety, which *Conrad* conveyed to *Edward Gray* and *Robert Taylor*, and by them it was transferred to the *Patapsco Manufacturing Company*; that they mortgaged it to *Henry Thompson*, *Talbot Jones* and others; and that it was afterwards, at the suit of these mortgagees,

(this defendant, *William Gwynn*, being a party to that suit,) sold under a decree of this Court; on which sale this plaintiff, *Allen Thomas*, became the purchaser, and has thus obtained a legal title in fee simple, to one undivided moiety of this tract called "*The Valley of Owen*," as particularly appears by the order of the 20th of August, 1825, in that suit, and the deed of the 19th of September of the same year, (these papers were returned with the commission.) Thus far this case is clear of all ambiguity or controversy.

But it appears by an agreement dated on the 24th of October, 1817, that the third line of this tract, called "*The Valley of Owen*," separated lands wherein five distinct parties were interested; that doubts were entertained by them as to its true location, and that it was the object of the agreement to fix its position beyond dispute. Accordingly with this view, a warrant of resurvey was obtained by *William Gwynn* for this tract, called "*The Valley of Owen*," by which its third line was located in pursuance of the agreement, and a certificate returned, and on the first of February, 1819, a patent obtained thereon for this land, by the name of "*Glen Owen*." It is this new name which has caused the confusion, and been the occasion of this suit. But by bringing the direct rays of a few particulars to bear upon this matter, the mist which has obscured it, may be readily dispersed.

William Gwynn, it must be recollected, became seized of the whole of this tract of land by the name of "*The Valley of Owen*," the one undivided moiety of which, by that name, we have traced from him into the hands of the plaintiff. This bill alleges that after the plaintiff had obtained a title to one undivided moiety of "*The Valley of Owen*," he purchased the other moiety of the same tract of the defendant. This defendant in his answer says, that on the 19th of October, 1821, (which was some time after he had purchased the tract, and obtained a patent for it, by the name of "*Glen Owen*,") he mortgaged his moiety of it by the name of "*Glen Owen*," to the *Mechanics' Bank*; and

after he had done so, he says in his answer, that he “admits that he agreed to sell and convey all his right, title, and estate, legal and equitable, in and to the said undivided moiety of the said tract of land, by whatsoever name it was or had been called, to the complainant; but charges that such agreement and sale was made, with a full knowledge on the part of the complainant, of the resurvey, the agreement in writing with *George Ellicott* and others, and the mortgage. This admission is corroborated by the proofs from which it appears, that the defendant agreed, and stipulated to sell his moiety of this tract of land to the plaintiff, by the name of “*The Valley of Owen.*”

It is perfectly clear then, that according to the contract, between these parties, as alleged, admitted and proved, this plaintiff is entitled to a conveyance from this defendant of the undivided moiety held by him of the tract of land called “*The Valley of Owen.*”

The operation of the agreement on which the resurvey was founded, and the effect of the notice which it is alleged the plaintiff had of that agreement, are matters foreign from present enquiry. The nature, and extent of the contract between the parties, has been clearly shewn and established. It has been complied with by the plaintiff, and he is therefore now entitled to have it fulfilled by the defendant.

Decreed, that the said defendant *William Gwynn* do, and he is hereby commanded forthwith, to convey by a good and valid deed, made, executed, acknowledged, and delivered, according to law, all his right, title, and interest, of, in and to the said undivided moiety of the tract of land in the proceedings mentioned, called “*The Valley of Owen,*” unto the said plaintiff *Allen Thomas*, to have and to hold to him, his heirs, and assigns, in fee simple, &c. and that defendant pay complainant his costs.

From this decree, the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, STEPHEN and ARCHER, J.

Johnson, for the appellant, contended,

1. That the contract between the parties was only for the land included within a resurvey upon the said tract, in which said land was called "*Glen Owen*."

2. That if it was otherwise, and the defendant below was bound to convey "*The Valley of Owen*," he had before the filing of the complainant's bill done so, by his deed to the complainant of the 16th February, 1826.

3. That in any event, costs should not have been decreed against the defendant below.

4. The bill does not sufficiently show what other assurance or deed, the complainant wishes the defendant to execute. On the *first* point he referred to the act of 1786, ch. 33, sec. 6. On the *second* to 13 *Johns. Rep.* 359. *Gazley vs. Price*, 16 *Ib.* 267. *Miller vs. Parsons*, *Ib.* 336. On the *third*, to 9 *Johns. Reps.* 336.

Magruder and *Alexander* for the appellee, contended, that the deed of February, 1826, was not so free from ambiguity, that a reasonable doubt might not be entertained, whether it did, or did not convey "*The Valley of Owen*," and therefore the grantee might call for another deed. The cases referred to on the other side, were cases at law for supposed breaches of covenant. It was not possible for the complainant to exhibit a deed to the defendant, such as he was entitled to, previously to the filing of the bill; the application to the Chancellor, being not only for a deed, but he was to prescribe such an one, as complainant was entitled to; they referred to *Buchanan vs. Stewart*, 3 *Harr. and Johns.* 329; and on the question of costs, to *Jenour vs. Jenour*, 10 *Vesey*, 571.

BUCHANAN, Ch. J. delivered the opinion of the Court.

The complainant in this case, alleges a contract with *William Gwynn*, the appellant, for the purchase of an undi-

vided moiety of a tract of land called "*The Valley of Owen*," and states that the appellant, in colorable execution of his contract, had made to him a deed which he refers to, and exhibits as a part of his bill; but alleging that he has been advised it does not convey to him, a clear and indisputable title to the land called "*The Valley of Owen*," with all the advantages incident thereto, seeks to obtain another deed in execution of the contract, and in pursuance of the covenant for further assurance contained in the deed objected to, but without pointing out the supposed defects in that deed.

The premises conveyed by that deed, are described to be "all that one equal undivided half part, or moiety of a tract or parcel of land, lying in *Anne Arundel* county aforesaid, called "*The Valley of Owen*," which was sold by the said *William Gwynn*, to the said *Allen Thomas*, on the twelfth day of February, in the year 1822, (and which at his instance to secure the payment of the purchase money to the *Mechanics' Bank of Baltimore*, the said *William Gwynn* conveyed by the name of "*Glen Owen*," to the *President and Directors of the Mechanics' Bank of Baltimore*, and the said purchase money being fully paid to the said Bank, the said President and Directors, by deed of the same date, have conveyed to the said *Allen Thomas*,) together with all and singular, the buildings and improvements, ways, water courses, rights, privileges, advantages, and appurtenances thereto belonging, or in any wise appertaining; and all the estate, right, title, interest, trust, property, claim and demand, whatsoever, at law, and in equity of the said *William Gwynn*, of, in, and to the same." There is in the deed a special warranty with a covenant for such further and other deed, conveyance and assurance, as may reasonably be required, "for the better and more fully conveying and assuring to the complainant, his heirs and assigns, "all the right, title, estate and interest, at law and in equity, which the said *William Gwynn* can lawfully claim, in and to the said premises, with the appurtenances."

The appellant in his answer, among other things says, that he made the deed so referred to, and exhibited by the bill, at the request of the complainant, and submits to the Chancellor whether he ought, under the circumstances set out in his answer, to make any further deed.

Several commissions were issued, and evidence taken in the cause, and on final hearing the Chancellor decreed that the appellant should forthwith convey to the complainant by a good and valid deed, all his right, title and interest, of, in, and to one undivided moiety of the tract of land called "*The Valley of Owen*," and that he should pay all the costs. From which decree, the case is brought by appeal to this Court.

In the view in which this case presents itself to us, it does not seem to be necessary to enquire into the nature and extent of the original contract between the parties, or whether the complainant was, or was not entitled to a conveyance of one undivided moiety of the tract of land called "*The Valley of Owen*," under that contract, for admitting the contract to have been as alleged in the bill, and that he was entitled to a conveyance of an undivided moiety of "*The Valley of Owen*," yet it does not appear to us, that he has any ground to stand upon in Chancery, or on which to erect a claim upon the appellant to do more than he has already done.

He admits that he has received from the appellant, a deed which he brings into Court, but demands of him to execute another, and calls on the Chancellor to enforce that demand. We have examined the copy of that deed exhibited with the bill, and are unable to discover in what it either is, or can be supposed to be, defective, either in form or substance, or as respects the name, or description of the land, but think it a good and valid deed to pass to the complainant in fee simple, all the right, title and interest of the appellant, in, and to one undivided moiety of the tract of land called "*The Valley of Owen*."

The counsel for the complainant have not suggested a defect, nor told us in what it was supposed to be deficient, and it is only from what fell in argument from the counsel for the appellant, that we learn there was some imaginary inaccuracy in the description given in the deed, which we have not been able to detect. It is described as being one undivided moiety of a tract of land called "*The Valley of Owen*," which had before been conveyed to the *President and Directors of the Mechanics' Bank of Baltimore*, by the name of "*Glen Owen*," that is, which undivided moiety of "*The Valley of Owen*," had been conveyed by the name of "*Glen Owen*," which is a clear and perfect description of it, as one undivided moiety of "*The Valley of Owen*." The complainant required no further deed, and the going into Chancery, to compel the defendant to make another, was a vexatious and unnecessary proceeding, and the bill ought to have been dismissed. The contract had been fulfilled, and it was unreasonable to drag the party into Chancery, to subject him to a decree to do what he had already done.

There should be some end to litigation, and Chancery should not be resorted to, for the purpose of unnecessarily harassing and subjecting a party to costs and charges, who has done all that he can properly be called on to do. The probability is, that the attention of the Chancellor was not called to the deed which had been given, but that he was left to suppose it was defective, and that another was necessary to the fulfilment of the contract, or looking to that deed, and seeing that it was not defective, but a good and sufficient conveyance in fee, to the complainant, of all the right and title of the appellant, to one undivided moiety of "*The Valley of Owen*," he would not, we presume, have entertained the bill. Bill dismissed with costs.

DECREE REVERSED.

KARTHAUS vs. OWINGS.—June, 1830.

K sued out a writ of Replevin, gave the usual bond, and the sheriff replevied the goods demanded. Judgment being rendered against him, he appealed and filed the usual appeal bond conditioned to prosecute his appeal with effect, and satisfy the damages and costs awarded by the county and appellate courts. Judgment was rendered against him upon the appeal. In an action upon his appeal bond the following questions were decided :

1. That a replication assigning as a breach " that the defendant did not prosecute his appeal with effect to the damage of the plaintiff, &c." was sufficient upon general demurrer, was an answer to a plea of general performance, and a plea " that the defendant did prosecute his appeal with effect."
2. That a plea in bar " that the appellant paid the debt, damages and costs adjudged by the County Court, and all costs and damages that were awarded by the appellate Court," is defective upon general demurrer, being no answer to the judgment for a return of property and costs.
3. That a plea in bar " that the replevin bond was, after the recovery in the appellate Court, and before the institution of this action, sued against B, (the surety of K therein) to judgment, and that B satisfied the plaintiff for that judgment," is, also defective upon general demurrer. The costs of the appellate Court are not paid by such satisfaction, nor does the plea show that the judgment of the County Court was satisfied before this action was brought.
4. That the plaintiff might give in evidence the value of the goods replevied; the record of the replevin was proper evidence to identify them, and the appraisalment made in such cases was *prima face* evidence of their value.
5. That the plaintiff's right to recover interest on the value of the goods replevied and costs of the replevin, was a question exclusively for the jury, and that the bills of exceptions taken and signed in the action of replevin, could not be read to the jury to show that interest ought not to be allowed.
6. That the record of the judgment against B the surety, and the execution thereupon issued, returned "*cepi*," "staid by injunction," is not evidence to show that the plaintiff had been satisfied that judgment, or that the amount thereof ought to be allowed by the jury in the assessment of damages.

The sound legal construction of the condition of an appeal bond, is, that it is an undertaking to reverse the decision appealed from, or satisfy the judgment of the appellate Court.

Where a plea contains matters of fact, as well as matters of record, it should not conclude with a verification by the record, but with a verification to the country.

A plea in bar must be a substantial and conclusive answer to the action.

The appraisers authorised in the case of rent by the *Statute Geo. 2*, have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied; their appraisement is *prima facie* evidence of the value of goods taken.

APPEAL from *Baltimore County Court*.

This was an action of *Debt*, on an appeal bond, dated May 2d, 1809, executed by the appellant, *Peter A. Karthaus*, on an appeal from a judgment in favor of the appellee, *James Owings*, as plaintiff in a replevin suit in *Baltimore County Court*. The condition of the bond is as follows: "Whereas the said *James Owings* did obtain judgment against the said *Peter A. Karthaus* in *Baltimore County Court*, in March term, 1809, and said *P. A. K.* is about to appeal from said judgment, so as aforesaid rendered, returnable to the next Court of Appeals. Now the condition of the above obligation is such, that if the said *P. A. K.* shall not pursue the directions of the act of assembly, entitled, "An act for regulating writs of error, and granting appeals to and from the Courts of common law within this province," at the next ensuing Court of Appeals, which shall be held for the western shore of the State of *Maryland*, and prosecute the same writ with effect, and also satisfy and pay to the said *J. O.* his executors, administrators and assigns, in case the said judgment shall be affirmed, as well all and singular, *the debt, damages and costs*, adjudged by the County Court aforesaid, as also all costs and damages that shall be awarded by the Court of Appeals aforesaid, then the said bond to be and remain in full force and virtue, otherwise of no effect."

The appellant, *Karthaus*, pleaded the following pleas, after craving *oyer* of the bond.

1. Performance generally of the condition of the bond.
2. That he did pursue the directions of the act of assembly, entitled, "An act for regulating writs of error, and granting appeals, &c." and did prosecute the appeal with effect.

3. That he pursued the directions of “the act, &c.” at the “ensuing Court of Appeals, as meant and mentioned in the condition of the bond,” and paid the debt, damages and costs, adjudged by the County Court, and also all costs and damages that were awarded by the Court of Appeals.

4. After setting out the execution of the replevin bond, with one *Charles L. Boehme* as surety, and the recovery in replevin in the County Court and the Court of Appeals, he pleaded—that the replevin bond was, after the recovery in the Court of Appeals, and before the institution of this action, sued against *Boehme* to judgment, and that *Boehme* satisfied the appellee the judgment.

5. After reciting the recoveries in replevin, as in the last plea, he pleaded that the replevin bond was sued to judgment by the appellee against *Boehme*, that a *ca. sa.* was issued on the judgment, that *Boehme* was taken under the *ca. sa.* and by the appellee and the sheriff was discharged from the execution.

6. After the recitals as to the replevin bond, and recoveries in replevin, as in the last pleas, he pleaded that after the recovery in the Court of Appeals, and before this suit was brought, the replevin bond was sued to judgment against *Karthaus*; that *Karthaus* appealed from the judgment—that his appeal was dismissed, and he was adjudged to pay costs, which he did pay accordingly.

To these pleas the appellee *replied* as follows:

To the *first* plea—that the appellant did not prosecute with effect his appeal from the judgment of *Baltimore County Court*. And he then assigned the following breaches.

1. That the appellant did not prosecute the appeal with effect.

2. That the judgment of *Baltimore County Court* was affirmed and ratified by the Court of Appeals, by whom it was also adjudged that the appellee “*should have a return of the said goods and chattels, to be detained by him irre-*

plevisable for ever;” and also, that costs and charges, &c. should be recovered against the appellant.

To the *second plea*, “that the appellant did not prosecute his appeal with effect, as alleged by him in his plea;”

To the *third, fourth, fifth and sixth* pleas, the appellee demurred, the appellant joined in these demurrers; and demurred to the replications to the first and second pleas.

The Court (ARCHER, Ch. J.) having given judgment against appellant on the demurrers, a writ of inquiry at bar was executed for assessing the appellee’s damages. In the course of the inquisition the following *exceptions* were taken by the appellant :

1. The appellee offered evidence to prove the value of the goods replevied ; but the appellant objected to the admission of the evidence, and the Court (ARCHER, Ch. J.) admitting it, he excepted.

2. To prove the value of these goods the appellee offered in evidence the records of proceedings in the replevin suit and appeal. And offered to prove that the property taken by the plaintiff in replevin, was worth the amount at which it was appraised, in the return made by the sheriff. The appellant objected to this evidence. The Court allowed it, and he excepted.

3. The appellee prayed the Court to direct the jury that they were at liberty to allow interest on the amount of the value of the replevied goods, and on the costs incurred by him in the replevin suit. The Court gave the direction, and the appellant excepted.

4. The appellant then, to show the jury that in the exercise of their discretion they ought not to allow interest on the value of the goods, offered to read to them the whole of the matters set forth in the record of proceedings in the replevin suit, which record had already, (under the second exception,) been given in evidence by the appellee. The appellee objected to the reading of the statements and evidence set forth in the bills of exceptions contained in that record. And the Court were of opinion that the bills of

exceptions could not be read for the purpose aforesaid. To this opinion, and the refusal of the Court, the appellant excepted.

5. The appellant then offered to read in evidence the record of the judgment, and execution thereon, of the appellee against *Boehme* as surety in the replevin bond, to show that, to the amount of said judgment, the appellee had been satisfied, and that, that amount ought in the present assessment of damages to be allowed the appellant. The record showed that a *ca. sa.* issued on the judgment, and that the sheriff returned to the *ca. sa.* "*cepi*," "*staid by injunction.*" The Court refused to admit this record in evidence for such purpose. The appellant excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause came on to be argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Mayer, for the appellant, contended,

1. That the *replication* to his *first plea* is insufficient, because the allegation that the appellant did not prosecute with effect, presents no issuable point; and because the proceedings in the prosecution of the appeal ought in substance to have been stated, and especially the nature of the judgment in *Baltimore County Court*; that without previously describing that judgment, the allegation, in the assignment of the breach, that it was adjudged in the Court of Appeals that the appellee "*should have a return of said goods and chattels*," is unmeaning and insufficient; that upon the terms of the condition of the appeal bond which refers to a judgment of the County Court, rendered for "*debt, damages and costs*," no breach could be assigned as upon a judgment for return of goods and chattels; and that, at least, the replication and assignment of breach should have alleged a failure of the appellant to perform the judgment of the Court of Appeals. On this point he cited, *Marston vs.*

Hobbs, 2 *Massa. Rep.* 433. 1 *Buller's N. P.* 166. *Karthaus vs. Owings*, 6 *Harr. and Johns.* 134.

2. The *replication* to the *second* plea is liable to the objections just mentioned, and to the further objection that no breaches are assigned. *Morgan vs. Blackiston*, 5 *Harr. and Johns.* 61.

3. Upon the *demurrer* of the appellee to the *third* plea, the appellant insists that the plea, if true, is a final bar to the appellee's claim, according to the *condition* of the bond; the "*debt, damages, and costs*," adjudged by the County Court, and the costs and damages awarded by the Court of Appeals, being the full measure of the claim for not "prosecuting the appeal with effect," according to the terms of the condition; that therefore the plea is applicable and is well pleaded. *Warner vs. Theobald, Cowper*, 588.

4. Upon the appellee's *demurrer* to the *fourth* plea, the appellant contends—that the judgment obtained against *Boehme* on the replevin bond, after the judgment in the Court of Appeals, and alleged to have been paid and satisfied by *Boehme*, bars the appellee's demand; because the claim which the appellee acquired under the replevin bond, after the judgment in the Court of Appeals, was co-extensive, and, in effect, identical, with any demand he could have then had, or can now have, under this appeal bond. *Carthew* 248, 519. Cases in the time of *Hardwick*, 137. *Jenney vs. Jenney*, 14 *Massa. Rep.* 231. 1 *Showers*, 400—1 *Saund.* 39. *Arnold vs. Bailey*, 8 *Massa. Rep.* 145. *Karthaus vs. Owings*, 6 *Harr. and Johns.* 134. 3 *Wilson*, 308. 1 *Shower*, 146. 2 *Ib.* 211. *Ferrers case*, 6 *Coke Rep.* 7. *Higgins case*, *Ib.* 45. *Sparies case*, 5 *Coke Rep.* 61. *Barnes vs. Crafter*, 2 *Wm. Blk.* 827. *Snider and Van Vechten vs. Croy*, 2 *Johns. Rep.* 227. *Rice vs. King*, 7 *Ib.* 20. *Johnson vs. Smith*, 8 *Johns. Rep.* 383. 1 *Saund.* 5 note, (1.) *Le Guen vs. Gouverneur and Kemble*, 1 *Johns. Cases*, 436. *Leonard vs. Wilkins*, 9 *Johns. Rep.* 232. *Wheeler vs. Van Houten*, 12 *Ib.* 311. *Canfield*

vs. *Monger*, *Ib.* 347. 13 *Ib.* 187. *Grant vs. Button*, 14 *Ib.* 377.

5. On the *demurrer* to the *fifth plea*, it will be contended, that the taking of *Boehme* under *ca. sa.* upon the judgment on the replevin bond, and the appellee's and the sheriff's discharge of him from that execution, amount to a satisfaction of the judgment—and that that judgment, covering the whole claim under this appeal bond, the satisfaction is a bar in the present action. *Croke Ch.* 75, 153.

6. On the appellee's *demurrer* to the *sixth plea*, it is contended—that the recovery of judgment on the replevin bond against the appellant, as stated in the plea, bars the appellee; because the suit being brought on the bond after the judgment in the Court of Appeals, and affording the appellee as large a remedy as he had under the appeal bond, and the *same evidence* being applicable to the actions on the replevin bond, and appeal bond, in point of law the *cause of action* in either case is the same; and recovery in one of the cases is all that will be allowed the appellee; and that consequently, the recovery, even without satisfaction, on the replevin bond *against the appellant*, is a bar to the present suit against him.

Upon the exceptions the appellant contends as follows:

On the *first* and *second exceptions*—The evidence of the value of the replevied goods was inadmissible, because the condition of the appeal bond does not justify the assignment of a breach in *not returning goods and chattels*—and because the record, on the subject of the value of the goods showing only the sheriffs' appraisalment, which is in no respect the act of the plaintiff in replevin, is not evidence of the value against the plaintiff. *Parker vs. Kennedy*, 2 *Bay*, 408. *Rowley vs. Stoddart*, 7 *Johns. Rep.* 211.

On the *third exception*—Interest ought, at least, not to have been allowed to be given by the jury upon the costs.

On the *fourth exception*—The whole of the matter contained in the record of the replevin suit was admissible in evidence, because the same record of proceedings had al-

ready been given in evidence by the appellee; because it was the only means that the appellant could use to inform the jury on the point of the propriety of charging the appellant with interest; and the only data they could refer to in the exercise of any discretion on the subject of allowing interest to any extent. Because, if not evidence of the facts set forth in the bills of exceptions in the record, the whole proceedings, including the statements of these facts, might have been read to show *the nature of the controversy* between the parties; and thus to guide the judgment of the jury as to the charge of interest. *Newson vs. Douglass*, 7 *Harr. and Johns.* 417. *Dederer vs. Del. Ins. Co.* 2 *Wash. C. C. Rep.* 62.

5. On the *fifth exception*—The legal inference from the proceedings on the judgment against *Boehme*, mentioned in this exception, is, that the judgment was satisfied; because the sheriff, having taken *Boehme* on the *ca. sa.*, could not, under any injunction, discharge him according to the law at that period; and, therefore, it was the appellant's right to insist on *Boehme's* commitment, and to make the sheriff answerable by defaulting him if he had discharged *Boehme*. But the return being equivocal, must not be interpreted to mean that the sheriff did discharge *Boehme*, the law not allowing such an effect to an injunction; and hence, especially, ought the record to have been allowed to be read in evidence, leaving to the appellee the right of rebutting, by other evidence, the presumption of satisfaction of the judgment derived from the proceedings against *Boehme* under the execution.

Taney, (Attorney General,) and *Johnson* for the appellee.

1. In considering the defendant's demurrer to the plaintiff's replication to the first plea, we must ascend to the first error, *Murdock vs. Winter*, 1 *Harr. and Gill*, 471. The first error is in the plea of general performance. The bond, the foundation of the suit, contains alternative conditions, and the performance of but one, pre-supposes the violation of

the other. One of the conditions is, that the appellant shall prosecute with effect; that is, to a successful termination of the appeal, and therefore the plea of payment, admits that he has not prosecuted with effect—the conditions being inconsistent, the plea of general performance is not good. *Stevn's Plea*. 369. Such a plea is not good, where the condition is in the alternative. *Ib.* 369. 2 *Saund.* 410, note (3) 2 *Chitty's Plea*, 529, note. But the breaches are well assigned, it being sufficient to negative the words of the covenant. *Marston vs. Hobbs*, 2 *Mass. Rep.* 437. 1 *Chitty's Plea*. 326. The covenant here is, that he will prosecute with effect, and the replication avers, that he *did not prosecute with effect*, which is in conformity with the decision in *Karthauss vs. Owings*, 6 *Harr. and Johns.* 134. If payment of the damages, &c. is a discharge, it should have been pleaded by the other side. *Ferguson vs. Cappeau*, 6 *Harr. and Johns.* 394. 1 *Chitty's Plead.* 298. If there is one good breach, it is immaterial what may be thought of the others, as upon the demurrer the final judgment must be for the plaintiff, if a declaration containing a good *count*, is demurred to, the plaintiff is entitled to judgment. *Wall vs. Wall*, 2 *Harr. and Gill*, 79.

2. The second plea alleges that defendant prosecuted with effect; the breach assigned is, that he did not prosecute with effect. If the plea is good, the breach is well assigned—if the breach is bad, the plea must be bad, and on the demurrer, we go to the first fault.

3. The third plea avers the performance of that, the non-performance of which, when assigned as a breach, was adjudged to be no breach. *Karthauss vs. Owings*, 6 *Harr. and Johns.* 134. A plea in bar must answer the whole of the plaintiff's case, and if it does not, it may be demurred to, by craving *oyer* of the bond—it is incorporated in the declaration, and every obligation imposed by it, must be averred by the defendant to have been performed; one of the obligations created by this bond, was, to prosecute with effect, and the plea does not aver the performance of this. On

this point they referred to 2 *Chitty's Plead.* 619, 620, 621, 622. 3 *Ib.* 290.

4. This plea does not allege, that the amount recovered in the suit on the replevin bond, is the same as is mentioned in the appeal bond. The plea of a former recovery must state affirmatively that the amount recovered in the first case is the same as is sued for in the second case. If the plaintiff in replevin fails in the County Court and appeals, but gives no appeal bond, his replevin bond is, notwithstanding, subject to be immediately put in suit. The appeal bond, therefore, constitutes a distinct, and independent liability. In this action, the evidence is essentially different from what would have been required in a suit on the replevin bond; nor is the thing stipulated to be done by the two bonds the same. In an action on the replevin bond, the costs of the appeal could not have been recovered, but if they could, the plea does not aver their payment. The conditions of the two bonds being variant, the performance of one cannot be pleaded to a suit on the other.

5. The allegation in this plea is, that the judgment against *Boehme*, the surety in the replevin bond, was technically satisfied. Such a defence can never be made by the principal. A mere technical discharge of one defendant, will not discharge a co-defendant. 3 *Chitty Black.* 327, (note.) *Brickwood vs. Anniss*, 5 *Taunt.* 614.

6. In support of the demurrer to this plea, they referred to 3 *East. Rep.* 250.

In arguing the exceptions, the breaches are to be assumed as well assigned.

On the *first* exception they cited *Karthaus vs. Owings*, 6 *Harr. and Johns.* 134.

2. The objection to the admissibility of the proof in this exception does not arise. The records were not offered to prove the value of the goods in the replevin suit, but to prove what those goods were. The value was proved by parol, and the defendant's prayer sought to exclude the whole. But suppose the question is presented in an action

against the plaintiff in replevin, the appraisement is *prima facie* evidence. Act 1799, *ch. 86, set. 1. Scott vs. Dorsey, 1 Harr. and Johns. 233.*

3. On the *third* exception they referred to *Newson vs. Douglass, 7 Harr. and Johns. 453.*

4. Facts set forth in an exception, taken on a former trial between the same parties, are not admissible upon a subsequent trial, against the party against whom the exception was taken. *1 Bac. Abr. 528.*

5. On this exception, they referred to *Cro. Chas. 440, 445. 2 Bac. Abr. 719.*

STEPHEN, J. delivered the opinion of the Court.

This suit was instituted on an appeal bond, on an appeal from a judgment of *Baltimore County Court*, rendered in favor of the appellee, against the appellant. In the course of the argument various questions were raised, and pressed with considerable zeal and energy; some of which are not free from difficulty: but one of the points on which the counsel of the appellant seemed mainly to rely, has already been solemnly adjudicated by this Court, and ought not now to receive a different decision, unless that adjudication was manifestly founded upon untenable and erroneous principles. To this action the defendant pleaded. *First*, the plea of performance generally. And here the Judge referred to the pleadings—Bills of exceptions and judgment of the County Court, as before set out, and then proceeded,—Was the judgment of the Court below correct in overruling the defendant's demurrer to the replication to the first plea? We think it was. It is not necessary to decide whether the plea of general performance was properly pleaded in the present case, or whether, if it was not, advantage could be taken of it by a general demurrer, or whether its ambiguity, with reference to the stipulations contained in the condition of the bond, was cured by the breach assigned in the plaintiff's replication; because it has been adjudged by this Court in *Karthaus vs. Owings*

6 *Harr. and Johns*. 134, that such breach was properly assigned, and the defendant's demurrer admitting the facts therein stated to be true, the plaintiff of course was entitled to judgment, according to the established principles of pleading. Independently of the weight justly due to a former decision of this Court, we think the breach was properly assigned by a negative averment that he had not, in the language of the condition of the bond, "prosecuted his suit with effect." In assigning breaches the general rule is, that they may be assigned, by negating the words of the covenant. The exception to this rule is, that when such general assignment does not necessarily amount to a breach; the breach must be specially assigned. 1 *Esp. N. P.* 158. 2 *Mass. T. Rep.* 433, 1 *Wheat. Selwyn*, 416 are to the same effect. The covenant of seisin and of right to convey come within the rule. The covenants against incumbrances, and for quiet enjoyment, come within the exception, for the defendant does not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants, the breaches should be specially assigned, shewing the nature of the incumbrance, and interruption complained of. The covenant of warranty also comes within the exception: for the defendant is not bound, by his general warranty, to warrant against all claims and ousters, and the plaintiff must assign a breach, by shewing an ouster by an elder or paramount title. "It is not necessary to state matter which would come more properly from the other side." The meaning of this rule is, that it is not necessary to anticipate the answer of the adversary: which according to *Hale, C. J.* is "like leaping before one comes to the stile." It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged, *Step. on Plea*. 354. As strongly and strikingly illustrative of the principle there laid down, he refers to a case decided in 1 *Term. Rep.* 638, where there was a covenant in a charter party "that no claim should be

admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival on a survey to be taken by four shipwrights, to be indifferently chosen by both parties;" and in an action of covenant brought to recover for short tonnage, the plaintiff had a verdict; the defendant moved in arrest of judgment, that it had not been averred in the declaration, that a survey was taken and short tonnage made to appear. But the Court held that if such survey had not been taken, that was matter of defence which ought to have been shown by the defendants; and refused to arrest the judgment; and *Ashhurst*, Justice, in delivering the opinion of the Court, lays down the following principle: "that where a right of action is once vested, any circumstance, the omission of which goes to defeat it, whether called by the name of a proviso by the way of defeasance, or a condition subsequent, must in its nature be a matter of defence, and ought to be shewn by the defendants: and all that is necessary *prima facie* to found an action of covenant upon, is, that the covenant should be broken." In the case of *Ferguson vs. Cappeau*, 6 Harr. and Johns. 401, the same rule is sanctioned and established. This Court there say, "It is a settled rule in pleading, that in an action founded upon a contract, if there be in the contract a proviso or condition, which operates only in defeasance of it, or merely respects the liquidation of damages, after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, but should come from the other side; but that if there be a condition precedent, or a proviso or other matter, which qualified the contract, or goes in discharge of the liability of the defendant, it must be stated." Upon failing to prosecute his suit with effect or to a successful termination, or in other words upon the affirmation of the judgment of the Court below by the Court of Appeals, the event occurred, by which the condition of his bond became broken, and he could only be discharged from his liability, by performing the alternative stipulation, in satis-

fyng the judgment pronounced by the Court of Appeals, this being matter which operated in defeasance of his responsibility, ought to have been pleaded by the appellant; for the sound legal construction of the condition of the appeal bond, was an undertaking to reverse the decision of the County Court, or satisfy the judgment of the Court of Appeals; and as the Court decided in 1 *Term. Rep.* 638, above referred to, that a right of action vested in the plaintiff from the defendants not having fully laden the ship before she left India, which they were bound by the covenant to do, and that all that is necessary *prima facie* to found an action of covenant upon, is that the covenant should be broken (and the principle is here equally operative,) so here we consider that a right of action vested in the appellee, when the appellant failed to prosecute his suit with effect, which by the condition of his bond he explicitly bound himself to do; from which right of action if he wished to discharge himself, it was his duty to have pleaded by way of defence that he had satisfied the judgment rendered by the Court of Appeals. We are therefore of opinion that the breach was well assigned by the averment that the appellant “did not prosecute his suit with effect,” to the damage of the plaintiff as there stated, and that the replication, concluding as it did, was right; for where a plea contains matter of fact as well as matter of record, it should not conclude with a verification by the record, but with a verification to the country. 2 *Saun. Plea. and Evid.* 315. 3 *Mod.* 79, there referred to—Upon the appellant’s demurrer to the replications of the appellee, to the appellant’s *first* and *second* pleas, we therefore think the judgment of the Court below was correct.

As to the *third, fourth, fifth* and *sixth* pleas of the appellant, to which the appellee demurred; and the appellant joined in demurrer. The principles of sound logic constituting the basis of the science of pleading, a plea in bar must be a substantial and conclusive answer to the action, *Step. on Plea.* 71. This Court are of opinion that the *third*

plea of the appellant is defective, because it should shew a compliance with the judgment of the Court of Appeals: every word of the plea may be true and yet the condition of the bond be broken; the plea that he had paid the debt, damages and costs adjudged by the County Court, and also all costs and damages that were awarded by the Court of Appeals, is not a sufficient answer to the judgment of the Court of Appeals, which is for a return of property and costs. He should have set out the judgment of the appellate Court, and then pleaded satisfaction of it, in order to discharge himself. That the appeal bond covers a case of replevin is no longer an open question, and if it was, the defence of the appellant must present a conclusive answer to the claim of the appellee, which is for a return of the property and costs.

The *fourth* plea we consider is likewise defective. The satisfaction of a judgment recovered, in a suit upon the replevin bond against the surety of the appellant, would be no bar to a suit upon the appeal bond, because the judgment in the County Court, is not co-extensive with the judgment in the Court of Appeals; the costs in the Court of Appeals at all events are not covered by it. And the plea moreover does not state that the judgment of the County Court was satisfied before this suit was brought, which was an essential averment to constitute a legal and valid plea in bar.

The *fifth* plea is equally, if not more defective than the *first*; certainly the technical satisfaction there pleaded would not be a bar to this suit, if the satisfaction pleaded in the former plea would not; besides an entry of the execution "not called by consent," is perfectly consistent with the facts contained in the plea, which, as we have seen, must be a substantive and conclusive answer to the action.

The *sixth* plea is still more feeble, ineffective, and unavailing than the others, with which it stands associated. It is, that judgment was obtained against him in

a suit upon the replevin bond, from which he appealed to the Court of Appeals; that his appeal was dismissed, and he was adjudged to pay costs, which he did pay accordingly. He admits in express terms that he did not prosecute his suit with effect, and the payment of costs, clearly was no bar to this suit.

In the execution of a writ of inquiry at bar for the purpose of assessing the damages of the appellee, (the judgment of the County Court on the demurrers being against the appellant) five exceptions were taken by the appellant. As to the first exception, we think the evidence admitted by the Court below was properly received, as it was adduced to prove the value of the goods replevied. The decision of this Court in 6 *Harr. and Johns*. 134, clearly settles this question. That case shews, that you may recover the value of the property upon the affirmation of the judgment, by pleading that the suit was not prosecuted with effect. The opinion of the Court below, expressed in the second exception, was not erroneous, because the records were proper evidence to identify the goods replevied. The appraisers, in the case of rent, are authorised by a statute passed in the reign of *George 2d*. 6 *Bacon's Abr.* 60, and have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied, in order as directed by that statute in the case of rent, to ascertain the sum in which the replevin bond is to be taken. This Court are therefore of opinion, that the appraisement was at least *prima facie* evidence of the value of the goods, at the time of the replevin, and was legally admissible in evidence for the establishment of that fact. The opinion of the Court we also think correct as stated in the *third* exception, in which they refused to exercise a controlling power and jurisdiction over the jury upon the subject of interest, to whom, in such a case, the power of granting it exclusively belongs, according to the decision of this Court in the case of *Newson and Douglass*, 7 *Harr. and Johns*. 453. We do not

Sprigg vs. Lyles, et al.—1830.

think that the Court erred in the opinion expressed in the *fourth* exception, because the statements and evidence contained in the exceptions in the replevin suit were clearly not admissible, or legal evidence, to influence the jury in the allowance of interest. If the witnesses were living, they ought to have been produced. *Bowie vs. O'Neal*, 5 *Harr. and Johns*. 231. Even proof of their testimony on the first trial, in case of their deaths, is only admissible upon the ground of necessity, no evidence that they were dead was offered in this case.

We are also of opinion that the Court were clearly right in the opinion given in the *fifth* exception. The discharge of the defendant by injunction, without the assent of the creditor, was clearly no satisfaction of his claim; we are therefore of opinion that the judgment of the Court below ought to be affirmed.

JUDGMENT AFFIRMED.

SPRIGG vs. LYLES AND WIFE, AND RICHARD LYLES
Cross Appeals, June, 1830.

A mortgage omitted to be recorded in due season from no fraudulent design, will, under the act of 1785, ch. 72, sec. 11, be decreed to be recorded, saving the rights of subsequent purchasers without notice of its existence; and upon a bill filed by the mortgagee, a sale of the mortgagor's interest at the time of its execution, will also be decreed with a like saving.

A mortgagee solicited a third party to purchase land, mentioned in his unrecorded mortgage, at sheriff's sale, under a judgment against the mortgagor, obtained after its execution, and for which, in fact, the mortgagee was responsible as surety. At the sale, notice of the mortgage was publicly given. The object was to obtain the land at a low price for the mortgagor and his family; but the scheme being defeated, and the party solicited having given full value for the land, such mortgage cannot be recorded without saving his rights.

Where the security which an unrecorded mortgage gives to a debt, has been abandoned for other security given by the debtor, and accepted by the creditor, such mortgage will not be decreed to be recorded.

APPEAL from *Montgomery* County Court, as a Court of Equity.

The bill filed on the 16th of October, 1823, by *John Sprigg* against *Robert Lyles* and *Juliet* his wife, and *Richard Lyles*, stated, that the said *Robert*, being indebted to the complainant, in the sum of \$2000, with interest from 21st July, 1817, for the purchase money of several tracts or parcels of land, sold by complainant to the said *Robert*, executed, together with his said wife *Juliet*, a mortgage of said lands to complainant, on the 3d December, 1819, for the purpose of securing the payment of the same, the complainant having conveyed the lands so sold to the said *Robert*, to his said wife *Juliet*, at his the said *Robert's* request. The bill further charges that the mortgage so as aforesaid executed by *Lyles* and wife, to complainant, was not recorded within the time required by law, which omission to record, was the effect of accident, and not the result of any fraudulent design, upon any one whatsoever. It is also alleged that some time in the year 1822, the interest of the said *Robert Lyles*, in the said lands, was sold by the sheriff of *Montgomery* County, in virtue of several writs of *fiери facias*, issued upon judgments rendered by *Montgomery* County Court against the said *Robert*, which judgments were upon, contracts, or agreements of the said *Robert*, made, and entered into, before the date of the before mentioned mortgage to complainant. That at the sale so made by the sheriff, the defendant *Richard Lyles*, became the purchaser, though he, as well as other persons present, were expressly notified on the day of sale, and before the sale, of the existence of the mortgage to complainant, and that the debt thereby intended to be secured was unsatisfied—the complainant therefore charges and avers, that the said *Richard*, bought with notice, that the purchase money for said lands was then due. The bill prayed that the defendant, *Robert Lyles*, may be decreed to pay the said purchase

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money with interest, by a certain day, and in default thereof, that the lands in the mortgage contained may be sold, for the payment of the same, that said deed of mortgage may be admitted to record, and for further relief.

Exhibit A. is a copy of the mortgage from *Lyles* and wife, to complainant, executed and acknowledged on the 3d of December, 1819.

The *answer* of *Richard Lyles* states, that he became the purchaser of the lands in the mortgage contained, at a sale made of the same, by the sheriff of the county, as alleged in the bill, and that he has paid the said sheriff the purchase money. That prior to the sale, the complainant advised this defendant, to become the purchaser of said lands, stating, at the same time, that a certain *Leonard Hays*, would probably bid them up, to a high price, but that he, the said *Sprigg*, would prevent his doing so, by apprising him of the existence of his mortgage on the property. That defendant objected to buying the said property, and remarked to the complainant, that at some future time, he might attempt to charge the same with his mortgage debt; which the said complainant then said, he never would do, and could not if such were his desire. That said mortgage was of no avail, and that it had been discharged by an assignment by *Robert Lyles*, to him, of bonds due from *Otho Sprigg*, of *Frederick* county. That confiding in the statements so made to him by the complainant, this defendant purchased the lands as before mentioned, which he would not under other circumstances have done. The defendant further states, that a portion of the money due on the bonds of *Otho Sprigg*, assigned as before mentioned, has been paid to the complainant, and that the balance is secured by a lien on valuable real estate in *Frederick* county. He admits that the judgments on which the first writs of *fi. fa.* issued may have been obtained, on contracts entered into by the said *Robert Lyles*, prior to the date of the paper filed by the complainant, purporting to be a mortgage.

The answer of *Robert Lyles* and wife, admits the debt from the said *Robert* to complainant, as charged in the bill, to secure the payment of which, they allege, that the said *Robert* agreed to assign to complainant, the three several single bills of a certain *Otho Sprigg*, of *Frederick County*, which single bills, were given on account of the purchase money of a valuable real estate in said County, upon which they were liens. That the complainant agreed to accept the said assignments as the only security for the debt, due by the said *Robert* to him. The defendant, *Robert*, states, that the complainant requested him, not actually to execute the assignments, but to permit the bills still to appear as his property, alleging as a reason therefor, that the said *Otho*, (who was his brother-in-law,) would in that case, pay them more promptly than if they were actually assigned to him. That on the 3d December, 1819, the said *Robert*, and complainant, being then about to set out for the western country, the said mortgage was executed, to guard against death or accident during their absence, and to show the balance due, and for no other purpose. That in the year 1821 the defendant, *Robert*, finding his circumstances much embarrassed, and that he might be compelled to apply for the benefit of the insolvent laws, informed the complainant thereof, and that the assignments of the bonds of *Otho Sprigg*, theretofore agreed on, must then be executed, or that in the event of his petitioning, he should be compelled to return them, as a part of his effects; upon which the complainant agreed to accept the assignments, and they were accordingly executed, and the bills delivered to him.

The defendants further state, that complainant has received about one hundred dollars, on account of said single bills. They admit that judgments were rendered against the defendant, *Robert*, in *Montgomery County Court*, as alleged by complainant, and that writs of *fi. fa.* issued as stated; and they believe they were rendered on contracts made prior to the date of the pretended mortgage to complainant. They deny that the omission to record said mortgage was the

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result of accident, as averred by the complainant, who, they affirm, knew perfectly well that recording was essential to its validity. They further say, that the single bills assigned the complainant as before mentioned, are now in suit in *Frederick County Court* for his use.

A commission issued, under which, the execution of the deed from the complainant to the defendant, *Juliet Lyles*, and the mortgage from *Lyles* and wife to complainant, as alleged in the bill, were duly proved by the magistrates before whom the same were acknowledged. It was also proved by the then deputy sheriff of *Montgomery County*, that on the 25th of September, 1822, he made sale of the lands in the mortgage mentioned, under writs of *venditioni exponas*, against the said *Robert Lyles*, after due and legal notice thereof, and that *Richard Lyles*, one of the defendants, became the purchaser of the same. That on the day of sale, and while the sale was proceeding, the complainant gave notice to the bidders, and others present, that he had a mortgage on the land, amounting, principal and interest, to about \$2400, or \$2500. That *Leonard Hays*, who was present, stated, that he had understood that complainant had a mortgage on the land in dispute, but not for so large an amount as he had stated; upon which *Richard Lyles* mentioned, that he had always understood complainant's mortgage was for as much as \$2000. It was proved on the part of the defendants, that \$100 had been paid to complainant in August, 1819, on account of *Otho Sprigg's* notes, assigned him by the defendant *Robert Lyles*. It was further proved, that the complainant, upon being informed by the deputy sheriff who made the sale, that he had writs of *capias ad satisfaciendum* against *Robert Lyles*, told him, the said deputy, that he would rather he should get *fi. fa's.* because he, the complainant, was security for said *Robert*, and would show the sheriff his property at any time. There was proof of some conversations between the complainant and *Richard Lyles*, in which the complainant apprised the said *Richard*, that one *Hays* would probably buy the land, and in that event, *Robert Lyles* would be

turned out of his house. This, complainant said, he was determined to prevent, and for that purpose declared, that he would let it be understood that he had a lien on it, which *Hays* would believe, if he, *Richard*, would not contradict it. It was proved that the single bills of *Otho Sprigg*, the assignment of which to complainant, by *Robert Lyles* was proved, amounted together to three thousand dollars, with interest from the 15th October, 1818. There was no evidence to show the precise understanding of the parties at the time of the assignment, whether they were received as a payment of the debt due from *Robert* to complainant, or merely as collateral security, but subsequently, complainant was proved to have said that they were taken as collateral security for the mortgage, and in part to indemnify the complainant against some responsibilities he had assumed for the said *Robert*. It was in evidence that these single bills were given by *Otho Sprigg* for the share of *Lyles* and wife, in some real estate in *Frederick* county.

The County Court, (KILGOUR and WILKINSON, A. J.) at March Term, 1828, passed the following decree:

This cause being ready for decision, the proceedings were carefully read and considered. It is thereupon, this 18th day of April, 1828, decreed by *Montgomery* County Court, as a Court of equity, that the deed of mortgage mentioned in the complainant's bill, from the defendants *Robert Lyles* and *Juliet Lyles*, dated, and executed on the 3d day of December, 1819, be recorded among the land records of *Montgomery* County, provided always, that such deed shall not destroy, or in any manner affect, any title that *Richard Lyles* may have acquired, as purchaser of said premises, at the sheriff's sale mentioned in the proceedings, or the title of any other purchaser of the premises, in case of a purchase, made after the date of the deed aforesaid, and without notice of such deed by the person making such after-purchase, whether such purchase be by contract, or by deed, recorded agreeably to law, nor shall such deed, though recorded as aforesaid, in any man-

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ner affect the creditors of the party making such deed, who may have trusted such party after the date of said deed. And it is further decreed, as aforesaid, that the complainant's bill of complaint be dismissed, as against *Richard Lyles*, one of the defendants in this cause; and that unless the defendants *Robert Lyles* and *Juliet Lyles*, on or before the 29th May, 1828, pay to the complainant, or bring into this Court to be paid to him, the sum of \$3280, with interest, &c. all the right, title, interest and estate of *Juliet Lyles* and *Robert Lyles*, to the property in the proceeding mentioned, shall be sold, for the payment of the same, &c.

From this decree, the complainant, and *Robert Lyles* and wife appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN and ARCHER, J.

Forrest, and *Magruder*, for the appellant, *John Sprigg*, contended :

1. That the decree ought to be reversed, and a new decree made, ordering the mortgage to be recorded, and the land sold, without excepting the life estate purchased by *Richard Lyles*, and 2d. That if the bill as to *Richard* should have been dismissed, it ought to have been without prejudice. The act of assembly of 1785, *ch. 72, sec. 11*, saves the right of those creditors only, who become such subsequently to the date of the mortgage, and without notice. This is not the case with *Richard Lyles*, who bought under judgments rendered on claims existing anterior to the mortgage, of which he was fully notified, at the time of his purchase, and before. The mortgage could not have been executed for the mere purpose of liquidating the amount of the debt from *Lyles* to complainant, because, at the period of its execution, the notes of *Otho Sprigg*, it is said, were in his hands, for that very purpose. Before complainant's deed to Mrs. *Lyles*, he was satisfied to rest upon the security of *Otho Sprigg's* single bills, as until then he retained the legal title. When called upon to

part with that, he required the additional security of a mortgage, and accordingly we find that both instruments were executed on the same day. It is impossible to suppose, that complainant would have consented to abandon his lien for the purchase money, on the faith of *Robert Lyles*, guaranty of *Otho Sprigg's* paper, as it is shewn, that *Lyles* at that very time was on the eve of becoming an insolvent petitioner. They referred to the acts of 1785, *ch. 72, sec. 11.* 1792, *ch. 41, sec. 3.* *Bowie's adm'x vs. The State, use Dryden*, 7 *Harr. and Johns.* 33. *Pannel and Smith vs. The Farmers' Bank*, 7 *Harr. and Johns.* 202.

Key, for the appellee, insisted, 1. That in regard to *Richard Lyles*, there certainly could be no equity to set up the mortgage, whatever might be thought of the equity, as against *Lyles* and wife. *Richard Lyles* purchased under a judgment, which, though rendered for a debt contracted prior to the mortgage, remained due at the date of its execution, and afterwards. The creditor therefore *trusted him*, after the mortgage, and his debt is consequently saved by the act of 1785, *ch. 72. sec. 11.*

2. At the time these judgments were obtained nothing was known of the mortgage. The liens created by them, are therefore unaffected by it. Suppose, instead of judgments, they had taken mortgages, and had them recorded in time, and without knowledge of the mortgage to complainant, would theirs not have overreached his? The mere delivery to them of the title papers would have been sufficient. *Sugden Vendor's*, 366.

3. The mortgage to complainant cannot be set up as against *Juliet Lyles*. The act of assembly requires, that the Court shall be satisfied that the mortgagee, who asks to have his mortgage recorded, has a fair equitable title to the premises. The bill, to be sure, asserts this title, but the answers deny it, and affirm that *Otho Sprigg's* notes were received by the complainant, in lieu of any other security. These notes were preferable to the mortgage, being an equi-

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table lien on a valuable real estate. By taking a security of this description, the vendor destroys his lien. 4 *Wheat.* 255. If husband and wife give a mortgage of the wife's land, for the husband's debt, and the mortgage by any circumstance becomes inoperative, it is not competent for the husband, alone, afterwards to revive it.

EARLE, J. delivered the opinion of the Court.

The record of this case has been attentively examined, and we are unable to discover therein, any particular, in which the equity jurisdiction of *Montgomery County Court* has erred. The disputed land in this cause was sold in 1817, and almost three years elapsed before the seller took from the purchaser, so much as a bond for his purchase money, and he seemed satisfied with no other security for it, than what the land sold of itself afforded. On the 3d December, 1819, he conveyed the land to the wife of the purchaser, and at the same time received from him obligations for his money, secured by a mortgage of the husband and wife, and made payable, with interest, in three equal annual payments. This mortgage deed was not recorded within due time, but the omission to record appears to have happened without any fraudulent design, or intention of the party, and such intention is no where in the proceedings imputed to him. It ought then, we think, to be decreed to be recorded, unless the security it gives to the debt has been abandoned for other security given by the purchaser, and accepted by the seller. This has been strenuously urged upon us, but we cannot perceive in the subsequent transactions between the parties, the smallest appearance of an abandonment. *Otho Sprigg's* paper to a larger amount was assigned in December, 1821, with a formal guaranty of the payment of it. It was, however, the guaranty of an insolvent man, and the assignment was unaccompanied by any understanding that this security was to be alone relied upon. The circumstances seem to exclude the idea that it could have been so relied upon. *Otho*

Turner vs. Plowden.—1830.

Sprigg had failed in 1820, and the mortgage by which the assigned paper was secured, proved to be defectively acknowledged; and it was uncertain whether other creditors had not preferences over the equitable lien on the mortgaged premises. In this state of things it would have been most unwise to give up any other security for this, and the inference cannot be made, without stronger facts to justify it than are here presented to us. We are therefore of opinion, that the Court below were right, in decreeing the mortgage from *Robert Lyles* and wife to be recorded, and a sale under the mortgage for the payment of the mortgage money. We also approve of the decree to dismiss the complainant's bill as against *Richard Lyles*. This part of the case rests upon different grounds from the former. The object of the parties appears to have been to secure a home for *Robert Lyles*, and perhaps too much zeal, and some indiscretion were manifested by them in endeavoring to attain it by the means used to prevent *Leonard Hays* from bidding for the life estate. The scheme, however, did not take, and *Richard Lyles* was made to pay the full value of it; and it is certain he became the purchaser, with the approbation, if not at the instance, of *John Sprigg*, who was relieved by the purchase from the payment of a large sum of money for *Robert Lyles*, for whom he was security.

DECREE AFFIRMED.

TURNER vs. PLOWDEN, Adm'r. of LLEWELLIN.—*June*,
1830.

An action instituted by L, upon a single bill payable to "L, executor of B," is an action in his own right, to which a debt due from him may be pleaded, and proved as a set-off; and he cannot go into evidence of the consideration of the bill, to shew that it was given for a debt due B, in order to exclude the set-off as due in another right.

APPEAL, from *Saint Mary's* County Court.

This was an action of *debt*, instituted July 5th, 1825, by *John Llewellyn*, in his life-time, against *Josiah Turner* the appellant, and *Henry Turner*, (whose death was suggested, while the cause was depending) on the following single bill signed by them.

“\$203 75, on the 20th day of June, next, we promise to pay to *John Llewellyn*, executor of *Jeremiah Boothe*, his heirs or assigns, or order, two hundred and three dollars, and seventy-five cents, with interest from date, &c. for value received. *January 25th*, 1825.”

Before the case was tried in the County Court, *Llewellyn* died, when his administrator, *William H. Plowden*, the present appellee, appeared and became a party to the cause.

The defendant pleaded payment, and an account in bar for rent due from *Llewellyn*, the intestate of the appellee; issues were joined upon these pleas.

1. At the trial, the defendant offered to read in evidence, the receipt of *William H. Plowden* to him for \$200, dated February 16th, 1827, to which the plaintiff objected, and the Court, (PLATER, A. J.) sustained the objection. The plaintiff then offered evidence to prove, that the note, on which the action was founded, was given for property belonging to the estate of *Jeremiah Boothe*, and sold by the said *John Llewellyn* as his executor. The defendant objected to the admissibility of this proof, but the Court (PLATER, A. J.) overruled the objection, and permitted it to go to the jury. The plaintiff then prayed the Court to instruct the jury, that if from the evidence in this cause, they should be of the opinion, that the rent charged in the account in bar was due from *John Llewellyn* to the defendant, in his individual right, and not as executor, that then the defendant is not entitled to be credited with it in this action. The Court (PLATER, A. J.) gave the instruction as prayed, and the defendant excepted.

The verdict and judgment being for the plaintiff, the defendant appealed to the Court of Appeals.

The cause was submitted on notes by the appellant to BUCHANAN, Ch. J. EARLE, and MARTIN, J.

Stonestreet, for the appellant,

1. The action being on a sealed note, the proof offered by the plaintiff to show its consideration, was inadmissible.

2. Although *Llewellyn* is described in the note as the executor of *Boothe*, still the suit was brought, and correctly brought, in his, *Llewellyn's* name; and therefore a payment to *Llewellyn*, or an account in bar against him, was competent evidence to defeat the action.

No counsel appeared for the appellee.

MARTIN, J. delivered the opinion of the Court.

The judgment in this case is reversed. The testimony offered by the plaintiff to prove the consideration of the bill, *under seal*, was not legal and proper evidence to go to the jury, and ought to have been rejected by the Court.

This action was instituted by *Llewellyn*, in his own right, and not in his capacity of executor of *Boothe*, and if the rent charged in the account in bar, was due from him, as a debt of *his own*, and not in his representative character, it was a legal set-off in this suit.

The error of the Court below appears to have proceeded from a misconception of the nature of this action. The debt to be set-off, must be due in the same right with that claimed. If, as they supposed, *Llewellyn* sued *as executor*, their instruction would have been correct; but the claim being in his own right, the prayer of the plaintiff ought not to have prevailed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Wells vs. Beall.—1830.

WELLS AND WIFE vs. BEALL, Adm'r of BRASHEARS.—June,
1830.

A devise to "A, and the heirs of his body, lawfully begotten," since the act of 1786, constitutes an estate in fee simple. A remainder, limited to take effect upon the determination of such an estate, is inoperative.

Rents and profits are recoverable in equity from those who take possession of a minor's real estate.

It is not necessary, under the Act of 1825, ch. 117, to file exceptions to the Auditor's report, to take advantage of objections in the Appellate Court, which the pleadings in the cause put in issue, and which do not depend upon the state of the accounts, though an account may be ultimately necessary to ascertain the extent of the claim.

APPEAL from the Court of Chancery.

In this case, a bill was filed on the 10th December, 1825, by the appellee, *Otho B. Beall*, as administrator of *Richard B. Brashears*, against the appellants, *William Wells* of *George*, and *Jemima*, his wife, and *William Wells*, executor of *Jacob W. Brashears*. It stated, that in the year 1797, a certain *John W. Brashears*, of *Prince George's* county, died, leaving five children, to wit: *Jacob W.*, *Richard W.*, *Beall*, *Hester*, and *Jemima Brashears*, having first duly executed his last will and testament, a copy of which is filed, and exhibited with the bill. This will was proved June 17th, 1797. By it, he devised to his son, *Jacob W.*, and the heirs of his body, lawfully begotten, his dwelling plantation, called *Ledgworth*, remainder to his sons *Richard W.* and *Beall Brashears*, and the heirs of their bodies, to be equally divided, with a reservation to his two daughters, of an equal right with the first devisee, *Jacob W.*, until their death, or day of marriage. There was also a similar devise to *Jacob W.*, of 44 acres, part of a tract called *Plummer's Pleasure*, with the like remainder, to *Richard W.* and *Beall*. The residue of the tract called *Plummer's Pleasure*, the testator devised equally to *Richard W.* and *Beall*, in fee tail general, with cross remainders in tail, to the survivor, and *Jacob W. Brashears*. The

testator then bequeaths a negro to each of his said three sons, specifically; directs that his tobacco then on hand shall be disposed of by them, for the purpose of paying his debts; divides among them equally, the residue of his real and personal estate, and names them as his executors. The bill further states, that *Beall Brashears* died in the year 1801, without issue, and without changing the estate created in him by the aforesaid will. That *Richard W. Brashears* died in 1806, intestate, leaving a widow, and an infant son, *Richard B. Brashears*, (complainant's intestate.) That *Hester* died without issue in 1802, and that *Jacob* died in January, 1816, without issue, and without in any way altering the estate, which he took under the will of *John W. Brashears*. That in 1816, *Jemima Brashears* intermarried with *William Wells, of George*. The bill charges, that from the death of *Richard W. Brashears*, (the father of the complainant's intestate,) to the death of *Jacob*; the said *Jacob* held possession of, and received and retained to his own use, the proceeds of the whole of said lands, and that since his death, the same have been exclusively held, occupied, and enjoyed by the appellants, *William Wells of George*, and *Jemima* his wife. That no part of said rents had been paid the complainant's intestate, in his life time, or to his administrator since, but the whole amount is now due. That on the 4th of July, 1824, the complainant's intestate departed this life, a minor, and that administration on his estate has been duly granted complainant by the proper authority. Prayer, that *William Wells*, the executor of *Jacob W. Brashears*, may be decreed to account with, and pay complainant, those portions of the profits of said lands, which accrued to his intestate, during the life-time of the said *Jacob*; and that *William Wells, of George*, and *Jemima* his wife, may be compelled to account for those which have become due since; and for general relief.

The answer of *Wells and wife*, admits that *John W. B.* died about the period stated in the bill, having made his last

will and testament, of which the complainant's exhibit is a true copy, and they refer to the same, for the purpose of ascertaining the true nature of the interests, and legal rights, which his children and devisees derived thereunder. The answer also admits that the testator left five children, as set forth in the bill, and that the particulars in relation to their several deaths, &c. are correctly stated; and it further admits, that complainant's intestate is the only son of *Richard W.*, one of the sons of *John W. B.*, and that he died an infant on the 4th July, 1824. The marriage of the appellants in 1816, is also admitted, and it is admitted that from the death of *Richard W. B.* in 1806, to the death of *Jacob* in 1816, all the lands mentioned in the will of *John W.* were held and enjoyed by *Jacob*, and that since the death of the latter, they have been held by these defendants. The answer then avers, that *Jacob W. B.* by a duly executed will, (a copy of which is exhibited and made a part of the answer,) devised the whole of his estate, to the defendant *Jemima*, and the heirs of her body, and they therefore allege, that they are lawfully in possession of all the estate and property which the said *Jacob* might legally dispose of, without responsibility to any one for the rents and profits thereof. They deny the title of *John W. B.* to the tract called *Plummer's Pleasure*, which they say was purchased, and paid for, by *Jacob*, out of his own funds, after the death of the former. They admit that *John*, in his life, together with one *Basil Beall*, made a contract for the purchase of said tract, but insist that no part of the purchase money was paid by him, and therefore they positively deny any accountability for the rents, &c. of *Plummer's Pleasure*. With respect to any interest which the complainant's intestate may be supposed to have acquired in *Ledgworth*, upon the death of *Jacob*, they are not unwilling to pay a reasonable sum when the extent of that interest shall be ascertained. The answer further states, that no administration was had on the estate of *John W. B.* and therefore they cannot speak confidently of the value of his personal

estate. They charge, however, as matter of belief, that the three slaves, of whom one was bequeathed to each of his three sons, *Jacob*, *Richard* and *Beall*, constituted the most valuable portion, and that consequently he could not have left assets sufficient to pay his debts, and the purchase money of *Plummer's Pleasure*. The three slaves were divided among the legatees, according to his will, and as *Richard* and *Beall*, thereby elected to take their legacies, rather than apply them to the extinguishment of the debt created for the land, they cannot now be heard to say that *Jacob* acted in his own wrong, in paying for the same out of his own funds, and taking the deed to himself. The statute of limitations was also insisted on as a defence.

The answer of *William Wells*, the executor of *Jacob W. B.* sets up, as a defence to the relief prayed against him, that he had fully and fairly administered the estate of his testator, and paid over the surplus to *William Wells*, of *G.* and *Jemima* his wife, agreeably to his said testator's will, long before he had any notice of the present claim. Upon proof of this, the bill was dismissed as to him with costs, without any opposition on the part of the complainant's solicitor.

A commission by consent then issued to take testimony, and the case was referred to the auditor to state an account of the rents and profits of the lands in the proceedings mentioned, from the depositions to be returned with the commission. Among other proof, the complainants offered a deed from *William* and *Benjamin Beall* to *Jacob W. B.* bearing date May 4th, 1802, which recited that *Basil Beall* and *John W. B.* had obtained a deed for *Plummer's Pleasure*, bearing date on the 31st of May, 1784, which deed being supposed to be defective, the parties, grantors therein, had conveyed the said land by a deed, dated March 18th, 1802, to the said *William* and *Benjamin Beall*, devisees of the afore-said *Basil*, and it having been agreed between *Basil* and *John W. B.* that the said *John W. B.* should have 144 acres of said land, the said *William* and *Benjamin*, as de-

visces of *Basil Beall*, in consideration of said agreement, and of the sum of £315 16s. 4, paid them by the said *Jacob W. B.* conveyed to the said *Jacob*, devisee of the said *John W. B.* the said 144 acres, part of *Plummer's Pleasure*. The complainant also proved, that *Jacob W. B.* had been heard to say, after the death of *Richard W. B.*, that he held fifty acres of land to which *Richard* was entitled.

On the part of the defendants it was proved, that *John W. B.* in his life-time had acknowledged that he paid no part of the purchase money of the land purchased by him jointly with *Basil Beall*, and that the latter had paid the whole; and they proved that after the death of the said *John W.* the purchase money was paid by *Jacob W. B.* who took the deed to himself with the knowledge and consent of *Richard*.

There was a good deal of proof taken on both sides, in relation to the annual value of the lands, and number of acres, from which the auditor, in pursuance of the order of reference to him, stated several accounts.

Exceptions were filed to these accounts, upon the ground that the auditor had estimated the annual value too high, and had assumed that the lands contained a greater number of acres than was warranted by the proof.

BLAND, Chancellor, (Dec'r. Term, 1827.)

From the pleadings and proofs it appears, that early in the year 1784, the late *John W. B.* and the late *Basil Beall*, obtained a joint deed, by which the legal title in a tract of land called *Plummer's Pleasure*, was conveyed to them. That *B.* was then in possession of the part of that tract, held and claimed by him, containing 144 acres, and also of another tract called *Ledgworth*, containing 126 acres, and that he died so seized thereof, some short time previous to the 17th June, 1797, leaving five children, *Jacob W.*, *Richard W.*, *Beall*, *Hester* and *Jemima*. The late *John W. B.* by his will, devised the whole of *Ledgworth*, together with 44 acres of *Plummer's Pleasure*, to his son *Jacob W.*

in tail, reserving an equal usufructuary right with his son, to his two daughters, *Hester* and *Jemima*, in *Ledgworth*, until their death or marriage; and on *Jacob's* dying without issue, the testator gave the 44 acres to his two sons, *Richard W.* and *Beall*, in tail, to whom he devised the remaining part of *Plummer's Pleasure*, in tail, with cross remainders to the survivor, and *Jacob*, in tail, in case of the death of either without issue. After which these devisees took and held under this will, and without any thing having been done by either of them to bar their respective estates tail. *Beall Brashears* died in the year 1801, without issue, and *Hester B.* died in the year following, also without issue, or having been married. Then *Richard W. B.* married *Mary*, and had issue, a son, *Richard B. B.* and died in the year 1806. After the death of *John W. B.* and prior to the month of May, 1802, *Jacob W.* took possession of that part of *Plummer's Pleasure*, which had been devised to him by his father, and after the death of his brother *Richard W.* he took possession of the whole of it; claiming it as his own, under a deed of the 4th May, 1802, in which it is recited, that he was "the devisee of the aforesaid *John*;" alleging that he had in fact purchased, and paid for it; after which, in the month of January, 1816, *Jacob* died without issue, having previously by his will devised all his estate, real and personal, to his sister *Jemima*, the now defendant, who afterwards took possession of the whole of *Ledgworth*, and of *Plummer's Pleasure*, of which the late *Jacob* had been in possession; and in 1816 she married the now defendant *William Wells, of G.* and they have ever since held, and do now hold possession thereof. *Richard B. B.* died an infant, on the 4th of July, 1824, without issue, and the complainant, as his administrator, on the 10th of December, 1825, filed this bill, for an account of rents and profits of so much of these lands as he was entitled to, during his life.

It clearly follows from this state of facts, that on the death of *Beall B.* his brother *Richard W. B.* became en-

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titled, as tenant in tail, to three fourths of so much of *Plummer's Pleasure* as had been so devised to them, which on his death, subject to his widow's dower, descended to his son *Richard B. B.* as tenant in tail, from which time his claim to rents and profits, arising out of so much of that tract as was withheld from him, commenced. Under the will of *John W. B.*, *Jacob*, *Hester*, and *Jemima* were usufructuary tenants, in common of *Ledgworth*, *Jacob* for the one half, and his two sisters, the other; and on the death of *Hester*, *Jacob* became entitled to take three fourths, and *Jemima* one fourth of the rents and profits of it. After the death of *Jacob*, without issue, *Ledgworth*, thus encumbered with *Jemima's* usufructuary interest, and the 44 acres of *Plummer's Pleasure*, together with the one fourth of a part of that tract, which he took as tenant in tail on the death of *Beall*, reverted to the heirs of the donor, who were *Richard B. B.* the intestate of the complainant, and *Jemima*, one of the defendants; consequently, upon the death of *Jacob*, the late *Richard B. B.* claim commenced for the rents and profits, arising out of his share of the lands which had thus descended to him, as one of the heirs of his grandfather, and which were withheld from him by the defendants, *Wells* and wife. These claims, as relates to *Ledgworth*, are not contested, but as to *Plummer's Pleasure*, they are opposed by the defendants, *Wells* and wife, on the ground that the late *John W. B.* had, in fact, no more than a mere equitable interest in that tract of land. That after his death, *Jacob* paid for it, and obtained a conveyance of the legal title to himself, and that too, with the knowledge of those under whom the complainant claims, and after they had actually received their distributive shares of the personal estate of the late *John*, which they ought to have applied, or have suffered to be applied, in satisfaction of the purchase money then due for this tract of land. But the deed under which *Jacob* claims, recites, that the legal estate in the tract called *Plummer's Pleasure*, had been previously conveyed to his father, the late *John W. B.* and *Basil Beall*; and it also

appears, that the late *John W. B.* and his son *Richard W. B.* had held undisturbed possession of this tract of land for upwards of twenty years, which of itself constitutes sufficient evidence of a legal title against every one. But in addition to all this, it appears that *Jacob W. B.* distinctly, and solemnly by his acts, elected to take and hold this land under the will, and as the devisee of his father, the late *John W. B.*; thus virtually recognizing a complete legal estate to have been in him, and consequently, neither *Jacob*, nor any one claiming under him, can now be permitted to question or invalidate the legality of the title of the testator *John W. B.*, in any manner whatever. 1 *Swans.* 394, 425, 433. But *Jacob W. B.* by his meddling and officious payment of the purchase money, as is alleged, surely cannot be allowed thus to form for himself, and those who claim under him, any ground of equity, whereon, in any way, to resist the claim of the complainant. *Prin. Eq.* 134. As to the statute of limitations which has been relied on as a bar, by *Wells* and wife, the infancy of the complainant's testator is a sufficient answer to that.

It appearing by the proceedings, and having been admitted in the argument, that *William Wells*, the executor of the late *Jacob W. B.* had accounted for the whole of the testator's personal estate which came to his hands, and that he had paid or delivered over the surplus, to the defendants, *Wells* and wife, no relief is asked against him. But the other defendants, *Wells* and wife, will be held accountable for the rents and profits of so much of *Plummer's Pleasure*, as the complainants' intestate was entitled to, which accrued and were received by *Jacob* in his life-time, in respect of the assets, which they derived from him. Whereupon, it is on this 29th December, 1827, adjudged, ordered, and decreed, &c.

From this decree, *Wells and wife* appealed to this Court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN and ARCHER, J.

Key and *Johnson* for the appellants, contended :

1. That *John W. B.* did not leave personal assets sufficient to pay his debts, including the purchase money for *Plummer's Pleasure*.

2. If he did, *Richard W.* and *Beall Brashears* were equally responsible for its application with *Jacob*, they being co-executors of the will of *John W.*

3. That as *Richard W. B.* was one of the residuary legatees of *John W.* and received his proportion of the personal estate, he cannot complain that it was not applied to pay the debt for *Plummer's Pleasure*.

4. That as regards the tract called *Ledgworth*, and 44 acres of *Plummer's Pleasure*, *Jacob W. B.* had in those lands, an estate in fee tail general, under the will of *John W. B.* which estate having been created since the act of 1786, ch. 45, the appellants (the devisees of said *Jacob*,) hold it free from any claim by *Richard W. B.* and those claiming under him.

5. That conceding *Richard W.* the father of the appellee's intestate, to have had any interest in the tract called *Plummer's Pleasure*, yet that as regards the forty-four acres of said tract, as also three-fourths of the one-half of the residue of said tract devised to *Beall Brashears*, by *John W. B.*, the said *Richard W. B.* had no interest in the same, and of course, the decree of the Chancellor in decreeing against the appellants, rents and profits for such portions, is erroneous.

On the fourth point they referred to the case of *Newton vs. Griffith*, 1 *Harr. and Gill*, 111, and insisted, that this objection to an allowance for the rents and profits of those parcels of land might be made, although there was no exception to the report of the auditor, on the ground of want of title in the complainant. The act of 1825, ch. 117, does not preclude the appellant's right to make any question raised by the pleadings; and the answer in this case, by referring to the wills for the rights of the parties, presents the question of what are those rights.

Magruder, for the appellee.

It appears from the exceptions to the report of the auditor, that there is no controversy in relation to the proportion of the residue of *Plummer's Pleasure*, to which complainants intestate was entitled. The dispute is respecting the annual value.

In regard to *Ledgworth*, the answer does not deny that complainant is entitled to something; it admits an interest, but the extent of that interest is questioned. The case was referred to the auditor to make a report, subject to exceptions, and as the exceptions only go to the valuation, the report, in other respects, must be considered as admitted to be correct.

ARCHER, J. delivered the opinion of the Court.

There is nothing in the peculiar exceptions filed to the auditor's report, which prevents this Court from examining the rights of the parties, in relation to the rents and profits of any of the lands mentioned in the bill. The answer denies the right to rents and profits, and it could not be necessary to frame the exceptions in such a manner, as would deny rights, which are put in issue by the pleadings.

The case of *Newton vs. Griffith*, 1 *Harr. and Gill*, 111, is conclusive to show, that although an estate tail was devised in *Ledgworth*, and 44 acres of *Plummer's Pleasure*, to *Jacob W. Brashears*, yet that he virtually took an estate in fee; and by the case of *Purnell's Lessee vs. Rider*, decided on the Eastern shore, the remainder limited to take effect after the determination of the estate tail is inoperative. The same doctrines settle the question, as to the estate which *Richard W. Brashears* and *Beall Brashears*, took under the will of *John W. Brashears*. They were tenants in common, in fee, of the residue of *Plummer's Pleasure*, not devised to *Jacob W. Brashears*. Upon the death of *Beall Brashears*, his moiety of *Plummer's Pleasure* descended to *Jacob W. B.*, *Richard B.*, *Hester B.*, and *Jemima B.*

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We perceive nothing in the facts disclosed which ought to prevent the rents and profits from being decreed to the complainant below, according to his interests in the lands.

During the period which elapsed from the death of *Richard W. Brashears*, till the death of *Jacob W. Brashears*, the complainants intestate was entitled to one half the profits of the residue of *Plummer's Pleasure*, which was not devised by the will of *John W. Brashears* to *Jacob*, and in addition to this, was entitled, as the representative of his father *Richard*, in consequence of the death of *Beall Brashears*, to one sixth of the profits of said residue; for at the death of *Beall Brashears*, his right in a moiety of the residue descended, to *Jacob*, *Richard*, and *Jemima Brashears*; *Hester Brashears* having died in 1802, before the right of the complainants intestate accrued.

By the will of *Jacob W. Brashears*, all his interest in the lands was devised to *Jemima*, one of the appellants; consequently, after the death of *Jacob*, the interest of the appellee's intestate remained the same as it was before his death.

The decree of the Chancellor is reversed, with costs to the appellants in this Court, and this Court will direct the auditor of the Court of Chancery to audit the account, according to the principles of this decree, and will direct the costs of the audit to be taxed as the costs in this Court.

DECREE REVERSED.

WELLS, *et ux.* vs. O. BEALL, *et ux.*—1830.

The Court of Chancery has jurisdiction to decree dower, and rents and profits, to the widow, from the death of her husband.

Where dower is claimed at common law, and the husband's title to the land is controverted, it must be made out at law; but it will not therefore follow, that a bill in Chancery for its recovery is to be dismissed, because the right to dower is denied. The Chancellor should in such case retain the bill for a reasonable time, until the right at law is established.

The statute of limitations is no bar in equity to a widow's claim for dower, or the rents and profits thereof. PER BLAND, CHAN'R.

APPEAL from the Court of Chancery.

The bill which was filed in this case by the appellees, *Otho B. Beall* and *Mary* his wife, on the 10th of December, 1825, against *William Wells* of *George*, and *Jemima* his wife, the present appellants, and *William Wells*, executor of *Jacob W. Brashears*, stated, that some time in the year 1797, a certain *John W. Brashears* of *Prince George* County died, leaving five children; one of whom, *Richard W. Brashears*, the former husband of the complainant *Mary*, died in the year 1806, intestate, leaving a son, since deceased. That the said *John W. Brashears*, by a duly executed will, (a copy of which the complainants exhibit,) devised to the aforesaid *Jacob W. Brashears*, (one of his sons in tail,) 44 acres of a tract of land called *Plummer's Pleasure*, and also by the said will, devised the residue of the said tract in tail, to be equally divided between the said *Richard W. B.* and *Beall B.* (another son,) with cross remainders, to the survivor, and the aforesaid *Jacob W. B.* That *Beall B.* died in the year 1801, without issue, and without altering the estate so devised to him, whereby the aforesaid *Richard W. B.* became entitled to three-fourths of the residue of the said land, and that upon his death, his widow, the complainant *Mary*, (afterwards married to the other complainant *Otho B. Beall*, became entitled to one-third of the rents and profits thereof. That at the death of *Richard W. B.* in 1806, the said lands were undivided, and they have continued since in the possession and use of *Jacob W. B.* who has received all the rents and profits of the same, promising to account to complainant *Mary*, for her dower right therein, but never doing so. That the said *Jacob W. B.* died in the year 1816, devising and bequeathing his whole estate to *Jemima*, (one of the appellants,) since intermarried with the other appellant, *William Wells* of *George*, and appointing *William Wells*, the other defendant, his executor. That since the death of *Jacob W. B.*, *Wells* and wife have had possession of the aforesaid land, and have received to their own use the rents and profits of the same,

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promising to account, &c. as the said *Jacob W. B.* had done before them. *Prayer*, that *William Wells*, the executor of *Brashears*, may be decreed to account with, and pay to the complainants, the rents and profits which accrued to complainant *Mary*, in the life-time of his testator, and that the appellants (*Wells and wife*,) may be compelled to do the same, in reference to the rents, &c. accrued since, and for general relief.

The *answer* of *Wells* and wife, admits, that *John W. Brashears* died in 1797, leaving five children, of whom *Richard W.*, the former husband of complainant *Mary*, was one. That he died in the year 1806, intestate, leaving an only son. They further admit that *John W. B.* made such a devise of the tract of land called *Plummer's Pleasure* as the bill charges, and that *Beall B.* died in the year 1801, without altering the nature of the estate created in him by the said devise of *John W. B.* But they expressly deny, that *Richard W. B.* the former husband of the complainant had, or could have, any title to the land so devised to him by *John W. B.* because the said *John W. B.* had not himself any title therein. They admit that *John W. B.* in his lifetime, *contracted* for the purchase of said land, but they deny that he ever paid any part of the purchase money for the same; and they allege, that after his death, *Jacob W. B.* made a new contract for the purchase of said land, and paid the entire purchase money out of his own private funds, taking a deed to himself for the same. They likewise admit, that from the death of *Richard W. B.* the said land has been held and used by *Jacob W.* and themselves, but they deny that either of them ever promised to account to the complainants, or either of them, for any portion of the rents and profits. They insist that *Jacob W. B.* was the rightful owner and occupier of said lands, and they exhibit and make the will of *Jacob* a part of their answer, by which he bequeaths and devises the whole of his estate to the defendant *Jemima* in fee tail general, and therefore they are not accountable to any person, for the rents and issues of

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the lands in question. They admit that *Jacob* died in 1816, as charged.

The answer of *William Wells*, the executor of *Jacob*, admits that he was constituted and qualified as his executor, but he alleged, and proved, that he had settled the estate, and paid over the residue, to the defendant *Jemima* and her husband *William Wells* of *George*, and the bill was dismissed as to him, without any opposition from the complainant's solicitor.

A commission issued, and proof was taken, among other things, in relation to the value of the rents of the land in controversy.—The opinion of the Court of Appeals however, renders a recapitulation of the proof, wholly unnecessary.

At December Term, 1827, BLAND, Chancellor, passed the following decree.

This case has been intimately associated, and in some respects blended with the case of *Otho B. Beall*, administrator of the late *Richard B. Brashears*, against *William Wells* and others. The two cases were argued together, and admitted to depend upon the same principles, to a certain extent. I therefore took up, and considered the case instituted by *Otho B. Beall*, as administrator, and have decided it first, because it manifestly involved every material principle of this case, and more.

This suit has been instituted to recover the rents and profits of the dower, to which it is alleged the complainant *Mary*, was entitled, in a portion of the land called *Plummer's Pleasure*; and her claim is opposed upon two grounds. First, that her former husband *Richard W. B.* had during the coverture, no more than a mere equitable interest of which she is not dowable, and secondly, the lapse of time, and the statute of limitations, is relied on as a bar. But as I have already explained and decided in the case of *Beall* as administrator vs. *Wells* and others, the late *Richard W. B.* the former husband of the complainant *Mary*, had, during the coverture actual possession, and a good, legal title,

and died seised of three-fourths of that portion of *Plummer's Pleasure*, which had been devised to him and his brother *Beall* in tail, by their father the late *John W. B.* and consequently she was entitled to dower of that land. And with regard to the statute of limitations I have formerly decided, that it constitutes no bar, and does not in equity, apply to a widow's claim of dower, or the rents and profits thereof, *Oliver vs. Richardson*, 9 *Ves.* 222. Whereupon it is on this 29th day of December, adjudged, ordered and decreed, &c.

From this decree the appellants *Wells* and wife, appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN and ARCHER, J.

Key, and *Johnson* for the appellants, contended,

1. That if *Richard W. B.* the first husband of the complainant *Mary*, had any title in the land in question, it was but an equitable title, and as he died prior to the act of 1818, *ch.* 193, his widow is not entitled to dower in it.

2. The title to dower being expressly disputed by the answers, the right should first be established at law.

3. Limitations is a bar to the recovery of the rents and profits, which became due more than three years prior to the filing of the bill.

1. *Richard W. B.* had no title to *Plummer's Pleasure*, or if any, but an equitable title. The answer expressly denies that he died seised of any part of said land. This denial is responsive to the bill, and throws the proof of title on the complainant, and there is no proof.

2. The objection to the want of jurisdiction in the Court, is open to us, notwithstanding the answer. In fact the question could not arise until the answer is filed, as it is not until then that the Court can know, that the title to dower will be disputed. A demurrer to a bill like the present, would admit the seisin of the husband, and of course the

right to dower would follow. As a general rule, it is admitted that in reference to dower, Courts of law and equity, have a concurrent jurisdiction; but when the *facts* upon which the claim rests, are controverted, the title must be established at law, before Chancery can grant relief. *Herbert vs. Wren*, 7 *Cranch*, 370. *Mundy vs. Mundy*, 2 *Ves. Jr.* 122. 4 *Kent's Com.* 70. *Jeremy's Equity*, 305. 1 *Johns. Ch. Rep.* 111. *Philips vs. Green*, 3 *Ib.* 302. *Swaine vs. Perine*, 5 *Ib.* 482. *D'Arcy vs. Wake*, 2 *Sch. and Lef.* 391. *Coop. Eq.* 134, 135. *Mundy vs. Mundy*, 4 *Brow. Ch. Rep.* 294.

Magruder, for the appellees.

1. The bill filed in this case, would have authorised a decree for profits, and an assignment of dower also. *Chalmers vs. Chambers*, 6 *Harr. and Johns.* 29.

2. If when the right to dower is contested by the answer, it must be established at law before Chancery can relieve, it does not follow, that the bill is to be dismissed. It must be retained until the right is ascertained. But suppose the objection to be a valid one, it should have been presented by demurrer or plea. After answer, it cannot be insisted on. On this point, he cited, *Mitf.* 109, 110. *Herbert vs. Wren*, 7 *Cranch*, 370. 2 *Johns. Ch. Cases*, 339. 1 *Fonb.* 19. 2 *Eq. C. Abr.* 382, 383. note (C.) *Jeremy's Eq.* 295. *Dimond vs. Billingslea*, 2 *Harr. and Gill*, 273. *Mundy vs. Mundy*, 2 *Ves. Jr.* 122. *Mundy vs. Mundy*, 4 *Bro. Ch. C.* 295. *Coke Lit.* 36, (B.) 1 *Madd. Ch. P.* 97.

Upon the question of limitations he referred to, *Oliver vs. Richardson*, 9 *Ves.* 222. 1 *Madd. Ch. P.* 197. *Swaine vs. Perine*, 5 *Johns. Ch. Rep.* 488.

ARCHER, J. delivered the opinion of the Court.

The jurisdiction of the Court of Chancery to decree dower, and rents and profits, to a widow from the death of her husband, seems to be well settled. *Swaine vs. Perine*, 5 *Johns. Ch. R.* 488, and the cases there referred to. It appears to be

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equally clear, that where dower is claimed at common law, and the husband's title to the land is controverted, it must be made out at law. *Mundy vs. Mundy*, 4 *Brown*, 295. *Mundy vs. Mundy*, 2 *Ves. Jr.* 122.

But it will not follow, because the right to dower is denied by the respondents, that the complainants bill is to be dismissed. The Chancellor should retain the bill for a reasonable time, until the right at law is established. *Curtis vs. Curtis*, 2 *Brown, Ch. Rep.* 619.

The decree of the Chancellor is *reversed*, and this Court will remand the cause to the Chancery Court, that such order may be there taken, as is prescribed by this decree.

Decreed, that the decree of the Chancery Court, in this case, be, and the same is hereby reversed, with costs to the appellants in this Court, and it is further adjudged, ordered, and decreed, that the record in this case, and all the proceedings therein, be remanded to the High Court of Chancery, and that the said Court retain the bill, for such time as the Chancellor may think, under all circumstances, reasonable, to enable the female complainant's title to the dower claimed by her in said bill, to be established at law, and that in the event of the said complainant's title to dower, being established in her favor at law, within the time aforesaid, that then, the said Court of Chancery do pass such a decree in the premises, as it might have done, had said title to dower not been controverted; otherwise that the Chancellor pass a decree in the premises, dismissing the complainant's bill with costs.

DECREE REVERSED.

PRICE'S Adm'r vs. TYSON'S Adm'rs.—June, 1830.

Under the 11th section of the act of 1785, ch. 80, it is the duty of the Court to continue a cause standing under a rule of reference, until an award is returned. The death of both parties, while it remains under that rule, does not abate the action.

When the parties to a cause, standing under a rule of reference, die before an award returned, and there is ground to warrant the County Court in reinstating the cause upon the trial docket, the regular course is to move for its reinstatement in the name of the original parties; when that is ordered, their death should next be suggested, then their representatives summoned to appear, and upon their appearance, the cause proceeds as in other cases.

Where one of the arbitrators appointed under a rule of Court, had removed from the State, and many years had elapsed since his appointment, without an award being returned, the Court on motion reinstated the cause.

PER HARFORD COUNTY COURT.

APPEAL from *Harford County Court*.

This was an action of *Assumpsit*, brought in *Baltimore County Court* on the 16th of September, 1815, in the name of *John Price*, (the appellant's intestate,) against *Nathan Tyson*, (the appellee's intestate,) and on the suggestion, &c. of the defendant, was transferred to *Harford County Court*, to March term, 1817. At August term, 1817, the whole matter in dispute between the parties was by consent, referred to *Lemuel Taylor* and *Robert Barry*, in the usual manner. The cause was continued on the reference docket, until March term, 1823, when the defendant suggested the death of the plaintiff, and *William Price*, (the appellant,) appeared as administrator of the deceased, to prosecute of and upon the premises, &c. At August term, 1823, the plaintiff suggested the death of the defendant, and leave was given to issue a summons, to be directed to the executor or administrator of the defendant to appear, &c. This leave was again given at the next, and at the succeeding terms, until March term, 1825, when a summons issued to *Mary Tyson*, *Isaac Tyson*, and *Moses Sheppard*, the appellees, as administrators of *Nathan Tyson*, to appear, &c. at the next term. At August term, 1825, the appellees being summoned, appeared,

&c. At March term, 1826, no award having been returned, and the cause having been still continued on the reference docket, the plaintiff prayed that the reference to the arbitrators might be stricken out, and the cause reinstated, suggesting in his petition, that *Lemuel Taylor*, one of the arbitrators, had long since removed from the State. The Court struck out the reference, and reinstated the cause. The plaintiff then filed his declaration containing sundry counts, charging that *Nathan Tyson*, in his life-time, to wit, on the 1st of June, 1815, was indebted to *John Price*, in his life-time, in the sum of \$13,000, for the freight, hire and charter of a certain schooner or vessel called the *Eutaw*, whereof the said *John* was owner, for the performance of a voyage from the port of *Baltimore* to the island of *St. Bartholomews*, &c. A rule was laid on the defendants to plead, for which purpose they imparled until the next term. At the next term, (August, 1826) the defendants moved the Court to correct the docket entries, alleging that it appeared by those entries that the defendant appeared in Court at March term, 1823, and suggested the death of the plaintiff, when in fact the defendant was not alive at the time the said suggestion was made, and it was made by *John Scott*, esquire, who was counsel for the plaintiff, and made the suggestion at the special instance of the now plaintiff. Affidavits were filed, stating that *Nathan Tyson* died before March term, 1823, of *Harford County Court*; that *John Scott*, esquire, informed the deponents, that the suggestion of the death of *John Price*, the original plaintiff, was made by him, acting on behalf of *William Price*, as administrator of the said *John*. The Court refused to have the docket entries amended. The defendants then pleaded, "that after this action was instituted, and while the same was pending, to wit, on the 15th of March, 1819, *Nathan Tyson*, the original defendant therein, died; and that afterwards, and before any suggestion of the death of the said *Nathan* was made to this Court, to wit, on the 14th of October, 1821, *John Price*, the original plaintiff herein, died; and this the

defendants are ready to verify. Wherefore they pray judgment of the writ and declaration aforesaid, and that the same may be quashed," &c. This plea was supported by affidavit. The plaintiff demurred to the plea, to which there was a joinder in demurrer. The County Court overruled the demurrer, and gave judgment for the defendants, with costs. From which judgment the plaintiff appealed to this Court.

The cause was argued before EARLE, MARTIN, and DORSEY, J.

Gill, for the appellant, contended, that the judgment of the County Court was erroneous under the true construction of the Act of 1785, *ch.* 80. That act in its first section provides, "That no action, brought, or to be brought, in any Court of law in this State, shall abate by the death of *either* of the parties to such action; but upon the death of any defendant, in a case where the action by such death, would have abated before this act, the action shall be continued, and the person interested on the part of the defendant, may appear," and in the case of a failure to appear, the plaintiff may issue summons for defendant, and enforce it by attachment. A similar provision also exists in relation to the plaintiff upon his death. It is also declared, that in case there be no appearance, or proceeding by either party in any case, before the 10th day of the second Court, after the death shall be suggested, then the action shall be struck off and discontinued.

An opinion has prevailed among the profession, that if both parties died before a suggestion of the death of either of them upon the record, the cause must abate. That idea is founded upon the technical notion that an actor must remain in Court, to suggest to the Court, the death of his opponent. No reason was assigned for this, except that the clerks had so made up their records from the passage of the law. The act in question is a highly remedial one. Its

great design was to prevent the abatement of suits, and to enable executors and administrators to prosecute and defend the causes of their deceased testators and intestates, at the very point at which their death left them. An object of this importance, so just and reasonable in itself, should not be restricted by formal objections. Every reason which would induce the legislature to prevent the abatement of actions, and permit the representatives of deceased parties to appear, prosecute and defend, in regular succession, (and which it is not disputed, they may do as often as the contingency of a death and the appointment of a representative demand, provided such representative's appearance is entered upon the docket before the death of the opposing party, or his representative) applies with unabated force, and equal justice, to the more calamitous case of the death of both parties. The opinion therefore, so long prevalent, but which has never yet been sanctioned by this Court, cannot be correct. It opposes the first principle in the construction of remedial laws. Cases within the equity and spirit of such laws, and for which the legislature would unquestionably have provided to the letter, had they been anticipated, are to reap the benefit of the remedy, as extensively, as if they had been expressly mentioned. *People vs. Utica Insurance Company*, 15 Johns. 380. 6 Bac. Ab. Stat. 382, 387, 391, 392. 6 Harr. and Johns. 388. The judgment of the County Court cannot escape this objection, even if it should not be shewn, that a cause standing under a rule of reference is particularly provided for by the 11th section of the same act. That section enacts: "That all causes referred by consent of parties and rule of Court shall be continued until an award is returned, and if a death of *either* of the parties happen before an award returned, and judgment thereon, such cause shall not abate by the death, but upon reasonable notice to the person succeeding in interest, (and not being a minor,) the arbitrators shall proceed to a determination, and return their award, upon which, judgment may be entered by the Court, notwithstanding the death of the parties." If arbi-

trators die, refuse to act, or neglect to return an award, the Court may in its discretion, and upon motion, reinstate the cause, and take order to have it fairly tried.

The section in question has never been construed by this Court. In this case arbitrators were appointed by rule of Court in 1817. *Tyson* died in 1819. *Price* died in 1821. During the period from the reference to the death of *Price*, it is not denied that the cause was regularly continued. The act commands the Court to continue the cause until an award shall be returned. Upon the death of either party, the arbitrators may proceed upon notice to the representative. The Court aware that the cause is under a rule of reference, and no award being returned, have no duty to perform, but to continue it. The principles and the equity which would prevent the abatement of an action not referred, apply with equal force to a referred cause, so long as it remains before the arbitrators. The Court continue it to enable the parties to have the security of a judgment when the arbitrators conclude it. The parties have the power to prosecute their rights before the arbitrators; and the presumption is, and ought to be, when they or their representatives sleep upon their rights, require no active diligence of their arbitrators, permit the Court to continue the cause for a series of years without complaint or opposition, that both are satisfied, and remain under the expectation of ultimately having their rights determined by the parties of their own selection. This presumption is confirmed by the privilege of either party being authorised to require the Court to reinstate the cause for trial after a lapse of eight months, without an award. After that much delay, the dissatisfied party may move the Court for a hearing in the ordinary course of justice. Neither party adopted this course until 1823, when *Price's* representative suggested his intestate's death, and appeared for him, and then suggested *Tyson's* death, and summoned his representatives into the cause. Both parties were in Court at August, 1825; at the succeeding term, March, 1826, the plaintiff

procured the cause to be reinstated; up to that term no complaints are heard of. A declaration was then filed, and an imparlance granted. It was after this imparlance and as the trial approached, the defendant discovered, that notwithstanding the command of the act of 1785, ch. 80, sec. 11, "to continue the cause until an award should be returned," that the action had abated by the death of both parties before a suggestion of the death of either on the docket. In this case, nothing is pleaded to rebut the presumption arising from a consideration of the legal rights of the parties, or the conduct of the principals, and their representatives. Why should the Court abate the action when the law directs its continuance? Why abate it when the silence of the parties towards the Court for years, remains unexplained? The law intended the parties should proceed under the reference, notwithstanding the death. To what rational cause can their silence be attributed, but the just expectation that the arbitrators would decide the controversy? If the arbitrators could not act, the parties knew that, or might have known it. There is no equity then in the plea of the defendants. The defendants should have taken a different course. If dissatisfied with the continuance of the cause, they should have moved the Court, as the plaintiff ultimately did, and forced the plaintiff to conclude the cause. To abate the action now, destroys the right. Limitations would bar the remedy. The attempt has been made to shew the Court, that the technical ground for the abatement of actions generally, assumed here, has no legal foundation. That in referred cases, it is in direct opposition to the words of the 11th section.

It is contended moreover, that this plea of abatement came too late. It was tendered after a general imparlance. The parties were both in Court, at August, 1825. At the succeeding Court, March, 1826, the cause was reinstated for trial, and continued under a rule to plead, and a general imparlance. This was without any saving to the defendant, any exception to the writ or to the jurisdiction. 1 *Chit. Plea.* 307. It is true the party who pleads in abate-

ment here, is not mentioned in the writ. The summons to appear is the writ as to him, and if he intended to plead in abatement to that summons, he should have demanded a special imparlance at August, 1825, or March, 1826. After the entry of general imparlance, the defendant may plead in bar of the action, but not in abatement, or to the jurisdiction. 1 *Chit. Plea.* 308. 1 *Tidd*, 418. *Stev. on Plea.* 90, 91, 93, 393. *Bank of Somerset vs. Whittington*, 5 *Harr. and Johns.* 490. 1 *Bacon*, 26, 27. This plea of abatement came too late.

Gwynn, for the appellees.

He contended, that the cause abated by the death of both parties. The representatives of neither being in Court, there was no authorised party to suggest the death, nor to move for a summons. That this difficulty was caused by negligence of the plaintiff, who was the surviving party. He said that at Common Law, when there was but a single plaintiff, or a single defendant in the cause, upon the death of either, the action abated. This defect had been but partially remedied by the Act of 1785, *ch.* 80. When the surviving party could get in his opponent's representative, and make him a party to the cause, the action did not abate. Diligence to that extent was indispensable. It could be repeated as often as the nature of the case required, but the rule, which required one party in Court, was inflexible, and had never been departed from in practice, since the passage of the Act of 1785. That the plea therefore which disclosed the death of both parties, before any suggestion of the death of the party first dying, and no appearance of his representative as above required, abated the action. He contended, if such was not the law, that causes affecting the estates of deceased parties, might be indefinitely continued. He maintained that the plea being filed at the next term after the re-instatement of the cause, was filed at the ordinary imparlance term, during which pleas of abatement were usually received. That this plea therefore was in time.

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He cited 3 *Saun.* 209. *b. no. 6 Harr. and Johns.* 388. Act of 1788, *ch. 80, sec. 11.*

EARLE, J. delivered the opinion of the Court.

Harford County Court decided this case against the plaintiff below, on a general demurrer to a plea in abatement, and, in our opinion, decided it erroneously. The Court went upon the ground, that both the plaintiff and defendant being dead, at the time of the suggestion, parties could not be made under the Act of 1785, *ch. 80.*

We think the parties were properly made, notwithstanding this circumstance, although the time of making them was not strictly regular. The cause stood in the name of *John Price*, against *Nathan Tyson*, and had been referred by consent of parties, and rule of Court, and long continued on the reference docket, waiting the return of the award, before the first suggestion was made. It was made at March term, 1823, while the case was still depending on the reference docket of the Court, and this is the irregularity which we should not have sanctioned. The 11th section of the act is positive, that a case referred, shall be continued, until an award is returned and a suggestion that might have led to a discontinuance of this suit, and which actually led to making new parties to it, was out of time, and should not have been allowed. The case ought to have been reinstated in the name of the original parties, and the suggestion of the defendant's death, then made by the administrator of the plaintiff.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

HAMILTON vs. WARFIELD.—*June, 1830.*

H chartered his vessel to W for a voyage to be made at and from B, to any port or ports in the West Indies, &c. and back to B, where the vessel was to be discharged, the dangers of the seas excepted; there was the usual covenant of sea-worthiness on, and during the voyage in the charter party W agreed to pay a certain sum for each and every month, and so in proportion for a less time, as the vessel should be continued on the voyage—in ten days

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after her return to B, or upon hearing of her loss ; and also agreed, at his cost, to victual and man the vessel, and pay all port charges during the voyage. HELD, that this constituted a charter for one voyage, to commence at B and terminate on the return of the vessel—that *pro rata* freight was only due upon a loss proceeding from the dangers of the seas,—that the contract was an indivisible one,—and the return of the vessel to B, a condition precedent to the payment of freight.

Appeal from *Baltimore County Court*.

This was an action of covenant upon a charter party of affreightment entered into on the 27th July, 1822, between the plaintiff, now appellant, agent of the owner of the schooner *Independence*, and the defendant, the appellee, freighter of the said schooner. The said schooner was freighted by the defendant, at and from *Baltimore*, to any port or ports in the *West Indies*, *Spanish Main*, or ports in the *Gulph of Mexico*, at the option of the freighter, and back to *Baltimore*, where the said schooner was to be discharged, the dangers of the seas excepted. The plaintiff covenanted with the defendant, that the schooner, on and during the voyage, should be tight, staunch and strong, &c. That the defendant might load and put on board, and unload and take from the schooner, full loading, of such goods, &c. as he should think proper—contraband goods excepted. In consideration of which the defendant agreed to pay to the plaintiff in full for the freight or hire of the schooner, the sum of \$200 for each and every month, and so in proportion for a less time, as the schooner should be continued on the said voyage, in ten days after her return to *Baltimore*, or upon hearing of her loss; and the said defendant did also agree, at his cost and expense, to victual and man the said schooner, and pay all port charges and pilotage during said voyage, and to deliver said schooner, on her return to *Baltimore* to the said plaintiff or his order, and also to keep her insured. It was also covenanted, that in all cases the period of time for the hire of the said vessel was to commence on the 8th of August, 1822, and end on the day of delivery of the vessel at *Baltimore* to the agent, or in the event of her total loss, upon the day on which she should

be last heard of. The declaration, after stating the charter party, the loading and sailing of the vessel from the port of *Baltimore* for the port of *Chagres*, on the *Spanish Main*; and that from and after the 8th of August, 1822, the defendant had and employed the said schooner in his service for the space of six months, and until the said schooner was lost. That the said schooner was lost while in the service and employment of the defendant, during the voyage mentioned in the charter party, on the 28th December, 1822, at *Chagres*, on the *Spanish Main*; of which said loss the defendant had notice on the 10th of June, 1823. Averment, that the plaintiff had kept his covenant, &c. and that the defendant had refused to pay him the sum of \$1200 for the freight or hire of the said schooner, growing due from the 8th of August, 1822, until the loss of the schooner at *Chagres*, &c. As a further breach, the plaintiff averred, that on the 1st of August, 1822, the defendant took the said schooner into his service—shipped a cargo on board of her, and dispatched her from *Baltimore* towards the port of *Chagres*, on the *Spanish Main*. That the schooner afterwards arrived at the port of *Chagres*, and was there unladen by the agents and factors of the defendant. That the defendant, in pursuance of the charter party, kept and retained the said schooner in his service for a long time, to wit, from the 8th of August, in the year last aforesaid, until the 28th of December, in the same year; and afterwards the said schooner was stripped of her sails, rigging, &c. and abandoned by the crew, which the defendant had put on board for the care and navigation thereof. Averment, that the schooner was left a wreck, and was then and there totally lost, and was not further employed by the defendant. Of all which the defendant had notice before the institution of this suit. And after such notice the defendant became liable to pay to the plaintiff the sum of \$1000 for the freight and hire of the said schooner from the 8th of August, 1822, until the day of her loss, viz. the 28th of December in the same year, the day on which she was last heard

of, in the prosecution of the voyage aforesaid, &c. which said sum of money the defendant had refused to pay, &c.

The defendant, after craving *oyer* of the charter party, &c. pleaded, 1st. That the said schooner *Independence* was not, at the commencement of the voyage aforesaid, and was not, during the said voyage, tight, staunch and strong, but was wholly rotten, unsound, defective and unseaworthy, whereby, and not by reason of any of the perils or dangers of the seas in the said charter party mentioned, the said vessel was prevented from arriving at the port of *Baltimore* on her return voyage, &c. He pleaded, 2dly, to the second breach in the declaration assigned, that the schooner *Independence*, after her arrival at the port of *Chagres*, and after the delivery of the cargo on the 8th December, 1822, was wholly rotten, unsound, defective and unseaworthy, and was so rotten, unsound, defective and unseaworthy from the commencement of her sailing on the said voyage, and had so continued during the whole of the voyage, whereby the said vessel was utterly disabled and incompetent further to prosecute the said voyage, and was prevented from arriving at the port of *altimore*, on her return voyage, from the causes aforesaid, and not by reason of any of the perils or dangers of the seas mentioned in the charter party, &c.

The plaintiff demurred generally to the *first* plea.

To the *second* plea he replied, that the said schooner was not wholly rotten, &c. and that she was not prevented by unsea-worthiness existing at the commencement of the voyage, from arriving at the port of *Baltimore* on her return voyage, &c.

The defendant joined in the demurrer to his *first* plea, and demurred generally to the replication of the plaintiff to the *second* plea. The plaintiff joined in the demurrer to his replication to the defendant's second plea.

The County Court overruled the demurrer to the first plea, and ruled good the demurrer to the replication to the second plea, and rendered judgment for the defendant.

From which judgment the plaintiff appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Gill, for the appellant, contended, that in the construction of charter parties as in other contracts, the intention of the parties to be collected from the instrument, was to guide the Court. In this case, *Hamilton* let his vessel to *Warfield*, to perform a voyage to ports not specified in the contract. *Warfield* was to man and victual the vessel. He was to pay all port charges and pilotage, during the voyage. These covenants shew, that neither *Hamilton* nor his agents, were to accompany the vessel, as in ordinary cases. Taking intention as the guide, the meaning of the covenant that the vessel was to be kept sea-worthy on and during the voyage, is that *Warfield* or his agents should do it, at *Hamilton's* expense. The covenant for sea-worthiness is not a condition precedent, and if any other construction prevails than the one insisted upon, it is still no answer to a claim for freight, when the voyage has been in part performed. The defendant must redress himself by his cross action. 3 *Kent. Com.* 159. *Lawes on C. P.* 22, 23, 24, 201. *Ritchie' vs. Atkinson*, 10 *East.* 295, 311. *Havelock vs. Geddes*, *Ib.* 555.

The contract to pay the freight on the return of the vessel, was only to fix the time of payment, and not intended to make her return, a condition precedent to the payment. The doctrines of condition precedent are harsh and unjust. In this case they would operate inequitably. The case disclosed upon the *second* breach, shews a part performance of the voyage under a charter party, a delivery of cargo at one of the ports selected by the defendant. It shews, that at such port the vessel was stripped of her sails and rigging, and abandoned by the crew, which the defendant had put on board her, for her care and navigation; that the schooner was left a wreck, totally lost, and not further employed. To this breach the defendant pleaded that the vessel was rotten and

unsound, during the entire voyage, and was thus prevented from returning. The plaintiff replied that the vessel was sea-worthy, at her departure from *Baltimore*, and was not prevented by any defect existing at the commencement of the voyage from returning. This case stands upon demurrer. The facts admitted by the pleadings are, that the schooner left *Baltimore* in good condition; that afterwards she became unfit to prosecute her voyage, either from the circumstance that *Warfield's* crew stripped and abandoned her, and left her a wreck, or from decay arising after a commencement, and consequently, after a part performance of the voyage. Now, if the rule be sound, that unseaworthiness arising after the commencement of the voyage, is no answer to a claim for freight, or if, as it is contended here, it was the duty of *Warfield* at *Hamilton's* expense, to put this vessel in order at *Chagres*, and it is believed that the last proposition cannot in this case be questioned, then *Warfield* ought to pay freight up to the time of abandoning the vessel. It was his default, that his crew abandoned, and technically wrecked this vessel in a foreign port. It was his default that the necessary repairs were not attempted, and the vessel put in a condition to return. The agreement to pay freight on the return of the vessel to *Baltimore*, never was intended to affect such a state of facts as the pleadings disclosed. That agreement anticipated the voyage to be performed in the ordinary way.

It is contended also, that *pro rata* freight is due in this case, because the vessel is in fact lost to *Hamilton*, and that, by the negligence of *Warfield* and his agents. The words upon hearing of her loss, do not necessarily mean a loss by the dangers of the seas. She might be lost in many other ways, and *Hamilton* could elect either to make *Warfield* pay for the loss of the vessel or for freight—Suppose she was sunk by the guns of a foreign fort for smuggling—Suppose her burnt by an insurrection in a foreign country—or by *Warfield's* agents; can it be successfully contended that

it was the intention of these parties, upon such unexpected contingencies, that *Warfield* was not to pay for the use actually made of the vessel? Would *Hamilton* have parted with his property on such terms? We think not; and the conclusion from this is, that *Warfield* cannot escape the payment of freight for the time actually employed, by a defence which shews that in point of law, the further prosecution of the voyage was prevented, either by the direct tort of his own agents, viz: the stripping of the vessel—or by the omission to perform the duty of repairing the vessel at *Hamilton's* expense, which the contract in its spirit imposed upon him. There are strong reasons why the return of the vessel should not be considered a condition precedent to the payment of freight. It would be a rule of unequal operation in this case. It is on one hand a total loss to *Hamilton*, on the other it may be no loss, perhaps a gain to *Warfield* to discharge himself from the vessel in a foreign port. His property abroad may be unsaleable, he may have converted his property into bills of exchange. It may be that commodities proper for a return cargo cannot be had. These are circumstances which experience and the universal understanding of mankind prove to exist. It is therefore entirely doubtful whether *Warfield* was injured to the extent of the freight claimed. When the cases arise which exhibit a certain loss to one party, and which make it uncertain whether his opponent has lost or gained, that construction of the contract, which defeats the action to the prejudice of the party certainly injured, ought not to prevail. The Court presuming both to be honest men, will not hold that they intended consequences thus unequal. It is no answer to this, that the state of the fact, rather than the contract would give the rule of law. From that it is impossible always to escape; it is a mixed question, and must be so, in every case where an unexpected contingency arises. It is the duty of a Court then to survey the whole ground, and apply the honest and rational intent, according to the best under-

standing of the equities of the parties. This is not departing from the rule which says the Court must look to the contract in construing it. It is merely applying the contract to the facts which have arisen since its execution, and declares that in such a case the contract fairly interpreted, says you intended to pay, and in such a case it says you did not intend to pay. In discharging this duty the equities of the parties are not to be disregarded. And there is no rule more substantially just than that, which refers plaintiff and defendant for breaches of covenant after part performance to their respective cross actions. He cited, *Havelock vs. Geddes*, 10 *East*. 567. *Hallett vs. Col. Ins. Co.* 8 *John*. 272. *Laws on C. P.* 162. 3 *Kent*. 157.

Taney, (Attorney General) for the appellee.

1. The contract in this case, was to not pay so much per month, but was for an entire sum, for an entire voyage out, and back to *Baltimore*; *Abbot on Shipping*, 360, (*Ed.* 1828) 362, 364. 10 *Petersd Abr.* 147—155.

2. The covenant to pay so much per month, for the voyage, on the return of the vessel, or in ten days after notice of loss, (the dangers of the sea excepted,) means a loss technically by the dangers of the sea, and a total loss. If the loss results from any other cause, the freight is not recoverable; being an entire voyage, the freight is payable on two contingencies; *first*, upon the return of the vessel; or *secondly*, upon her total loss, by the perils of the sea. These being conditions precedent, (*Abbot on Shipping*, 329, *note* (1) (*Ed.* 1828.) to entitle the plaintiff to a *pro rata* freight, the loss must not only be total, and irreparable, but also by the dangers of the sea, unless caused by the defendant, or his agents. To show the meaning of a loss by the perils of the sea, he referred to 5 *Petersd.* 378, 379.

The plea to the first breach laid in the declaration is, that the vessel was unseaworthy at the commencement of the voyage, and that thereby, the voyage was defeated; this plea the demurrer admits to be true. In support of it

he referred to *Abbot*, 252, 253. The question upon this plea is, whether in the case of an entire voyage, a party can recover freight, who stipulates for the sea-worthiness of his vessel, when he admits that voyage to have been defeated by unseaworthiness.

In support of the defendant's demurrer to the replication to the second plea, he referred to, 10 *Petersd.* 146, (note) *Ib.* 151.

MARTIN, J. delivered the opinion of the Court.

It appears from the charter-party relied on in this case, that the schooner *Independence* was chartered by Warfield, to perform a voyage at and from *Baltimore*, to any port or ports, in the *West Indies*, *Spanish Main*, or in the *Gulph of Mexico*, and back to *Baltimore*. The intention of the parties where it can be fairly obtained from a charter-party ought to prevail in its construction, and we think it is manifest from the terms of the agreement, that this constituted but one voyage, to commence at and from *Baltimore*, and to terminate on the return of the vessel to the same place: It is agreed in express terms that the freight should be \$200 a month, for the time the vessel was performing this voyage, *to be paid in ten days after her return to Baltimore*. We do not take into consideration that part of the charter-party, that allows a *pro rata* freight for the time the vessel was engaged in the voyage, *in case of a total loss*, because we think it forms no part of this case, that relates *only* to a loss, *proceeding from the dangers of the sea*. The cases referred to in the argument to shew a covenant, that a vessel forthwith be made tight, staunch, and strong, &c. is not a condition precedent, and if the freighter uses the vessel he shall be chargeable with freight *pro rata*, &c. would have great weight, where the case rested upon such a covenant *alone*, but in this charter-party the stipulations are, not only that the schooner on, and during the said voyage, should be tight, &c. but also *that the freight should be paid in ten days after the return of the*

vessel to Baltimore. The question then upon which this case depends, and upon which it must be decided, is, whether under this charter-party, the return of the *Independence* back to *Baltimore* is a condition precedent to the payment of freight? Upon examining the *English* authorities, many nice, and almost imperceptible distinctions, may be found upon the doctrine of freight *pro rata itineris*, but it seems to be settled, that where freight is to be paid after the return of the vessel from her destined voyage, her return is a condition precedent, and no freight is demandable, until that condition is performed. Here is a contract between the parties, in writing, under seal, and the terms of their agreement expressed in plain and unambiguous language. It cannot, we think, be doubted, that it was the clear intention of the contracting parties, that *Warfield* should have the benefit of the whole voyage, at and from *Baltimore*, and back to the same place; and this voyage being performed he was in ten days afterwards to pay the freight; this is an indivisible contract, the freight depending upon the performance of the whole voyage, and by the express agreement of the parties, not to be demandable until *after* the vessel should return to *Baltimore*; if the vessel was lost by the dangers of the seas, then a *pro rata* freight was to be allowed, and paid in ten days after the loss was ascertained; but if no injury was sustained from that cause, the whole voyage was to be performed, and then, and not till then, the charterer had a legal claim for freight. The case of *Smith vs. Wilson*, 8 *East*. 437, is an authority in point to sustain this case on the part of the appellee. That was an action to recover freight on a charter-party of affreightment, not exactly similar in all its provisions to the one now before us, but sufficiently so, to decide the question upon which this case depends. In the reported case, among other covenants not necessary to be here enumerated, it was stipulated that the ship being properly fitted, &c. should receive or take on board at *London* or *Portsmouth*, such goods as the freighter might think proper to ship, and should sail and proceed

therewith to *Monte Video*, &c.; and being arrived there, should give due notice thereof to the agents of the freighter, and make a right and true delivery, &c. and after such delivery should receive and take on board from the freighter, or his agents, &c. a full and complete cargo of lawful goods, and immediately set sail from thence, and proceed to some one port of discharge in *Gréat Britain*, &c. and there deliver the said cargo, &c. and there end his said intended voyage, (the act of God, the King's enemies, and the dangers of the sea excepted,) in consideration whereof the freighter covenanted that he would pay £670 *sterling* per month, for every calendar month the ship should be employed by him, during the said intended voyage to *Monte Video* and back to her port of discharge, and so in proportion for any less time, in full for the freight, or hire of said ship during her intended service; such freight to commence from the day the ship should be ready to receive the goods on board at *Portsmouth*, and end when she should have finally discharged the whole of her said cargo, &c. *such freight, &c. to be paid on the arrival of the said ship* at her destined port in *Great Britain*. The ship took on board a cargo at *Portsmouth* and commenced the voyage, but from causes stated in the report, never did arrive at her destined port in *Great Britain*. The Court decided that by the terms of the charter-party, the freight, &c. thereby covenanted to be paid, on the part of the defendant, are all of them expressly covenanted to be paid, *on the arrival and discharge of the ship at her destined port in Great Britain*; and of course, are made to depend on the event of such arrival and discharge, at her destined port in *Great Britain*, as a condition precedent to the plaintiff's right to demand the same. This doctrine is recognized by *Lord Ellenborough*, in *Ritchie vs. Atkinson*, 10 *East*. 308,—he says where, as in *Smith and Wilson*, the freight is made payable upon an indivisible condition, such as in that case, the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a

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condition precedent, because it is incapable of being apportioned, *Cook vs. Jennings*, 7 Term. Rep. 381. We are of opinion, that as the schooner *Independence* did not return back to *Baltimore*, within the terms of the charter-party, the freight claimed, never became demandable by law.

JUDGMENT AFFIRMED.

GLENN vs. SMITH, Adm'r D. B. N. C. T. A. of HASLETT.—
December, 1830.

G, as administrator of A, took possession of various articles of personal property left by her, part of which she held as executrix of H, and sold them. Some years after this, letters of administration *d. b. n.* upon H's estate were granted to S, who brought *trover* against G, for that part of the property which had originally belonged to H. HELD, that although S was present at such sale and purchased some of the articles, yet he was not precluded thereby from recovering from G for this conversion.

Letters testamentary or of administration granted in another State, give no authority to sue, or to administer assets in this State; and will not exempt a party from liability, in an action by the rightful administrator here, though distribution be made in conformity to such letters.

H died indebted to I, leaving A his executrix, who came into the possession of assets, and paid I the notes mentioned in the following receipt, written at the foot of his account: "Received of A, executrix of H, two promissory notes signed by herself, and endorsed by G & Co. in payment of the above account." Before these notes arrived at maturity, A died, and G, her executor, took possession of her estate and sold it, and paid the notes in question. Letters *d. b. n.* upon the estate of H were granted to S, who sued G in *trover* for the value of property which belonged to H, but which G had sold as executor of A. HELD, that the acceptance by I of the notes in question, was not an extinguishment of the debt due him by H; that the payment by G, was, therefore, the payment of H's debt, and entitled him to deduct that payment from the proceeds of H's personal property sold by him.

The acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled, or show it to be lost. But the creditor will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial, to be cancelled.

The acceptance by a creditor, of a note or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time.

In either of the above cases, an express agreement by the creditor to receive the note or bill absolutely as payment, and to run the risk of its being paid, is an extinguishment of the previous debt, whether the note or bill be afterwards paid or not. Such agreements are not to be implied from the use of the words, "in payment of the above account," in a receipt for the note.

To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shewn.

The acceptance of a note by a creditor for a precedent debt, is a suspension of his right of action until the note reaches maturity.

There are acts of intermeddling, such as locking up the goods of a deceased person for safe keeping, which will not charge a man as executor of his own wrong.

The taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will, as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands.

As against creditors an executor *de son tort* is justified in paying the debts of the deceased; and if sued by such he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot in any case, retain any part of the goods of the deceased in satisfaction of his own debt.

In *trover* by a rightful executor against a wrongful one, for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debt; but under the general issue, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, as when the debts are just, and there is no deficiency of assets.

APPEAL from *Baltimore County Court*.

This was an action of *Trover*, instituted on the 15th February, 1826, by the appellees, *James Smith*, as administrator *de bonis non cum testamento annexo*, of *William W. Haslett*, against the appellant, *Elias Glenn*. The case has already been before this Court, and will be found in *7 Harr. and Johns. 17*.

The defendant pleaded not guilty, and *actio non*, &c. to which there were issues.

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1. At the trial, the plaintiff having given evidence that the articles stated in the plaintiff's nar, were the property of plaintiff's testator, and were converted by defendant to his use, the defendant then proved that Doctor *William W. Haslett*, the plaintiff's testator, was, at the time of his death, indebted to a certain *John Heslip*, in the sum of \$1261 40, as is stated and appears by the account herewith exhibited.

"1814. Dr. *William W. Haslett*, dec'd. To *John Heslip*.

May 4. To balance due on land, - - \$337 50

To amount of stock, to wit, horses, cows,
sheep, hogs and farming utensils, pur-
chased, - - - - - 852 50

To interest on one half, per agreement for
six months, - - - - - 17 85

To interest on the other half of the above,
per agreement for 18 months, - 53 55

\$1261 40

"May 4th, 1814. Received of Mrs. *Ann Haslett*, executrix of *William W. Haslett*, two promissory notes signed by herself, and endorsed by *John W. Glenn & Co.* in payment of the above account. *John Heslip.*"

And then proved, the signature of *John Heslip* to said receipt. He also gave in evidence, the two promissory notes mentioned in the said receipt though the payment in fact. And proved, that said notes were paid by the defendant as executor of *Ann Haslett*, and that the defendant was, when said notes were given, and afterwards, one of the said firm of *J. W. Glenn & Co.* and then offered to contend before the jury, that for the amount of said payment he was entitled to be allowed out of the value of the property in dispute in this cause, but which the Court, [HANSON and KELL, A. J.] refused to permit, and said, that *John Heslip* having accepted the notes of *Ann Heslip* in payment of his claim against *William Haslett*, (and passed his receipt for the same,) which notes and receipts on the bill are referred

to and inserted above, extinguished his, the said *Heslip's* claim against the estate of *William Haslett*, and he became the creditor of said *Ann Haslett* for the amount of said notes, and that the defendant, *Elias Glenn*, having paid the said notes, as executor of *Ann Haslett*, he, although an endorser thereon, as one of the firm of *John W. Glenn & Co.* is not entitled to be allowed the same as a payment made by him for the estate of *William Haslett*, as executor *de son tort* of said *William*. The defendant excepted.

2. The defendant in addition to the testimony stated in the preceding bill of exceptions, offered in evidence to the jury, by *Matthew Murray*, a competent witness, that part of the property claimed by the plaintiff in this suit, was exposed to sale at auction by the defendant, sometime in November, 1814; and further proved by said witness, who was auctioneer at said sale, that *James Smith*, the present plaintiff, was at said sale, and was a purchaser, to the best of said witness's recollection, but of what articles witness could not recollect.

The plaintiff then, offered in evidence to the jury, the letters of administration *de bonis non* on the estate of *William Haslett*, granted him by the Orphans' Court of *Baltimore County*, and which are dated July 21st, 1821. And further proved, that at the said sale at auction mentioned by the aforesaid witness, *Matthew Murray*, the defendant sold, together with the said part of the goods claimed by the plaintiff in this suit, a considerable quantity of other goods, and that defendant sold the whole of said goods at said sale, as executor of *Anne Haslett*, the widow of plaintiff's testator. And the said *Matthew Murray*, being cross examined by the plaintiff's counsel, stated, that he had no knowledge of a purchase by the plaintiff, of any of the goods now claimed by him, or for which he seeks to recover in this suit, but that, to the best of witness's recollection, the plaintiff was a purchaser at the sale aforesaid, but whether the things so purchased were a part of the said property in dispute in this action, the witness does not know, except as

before stated. Whereupon the defendant prayed the opinion of the Court to the jury, that inasmuch as the plaintiff was a purchaser, at the sale of property made as aforesaid, by defendant, as executor of *Ann Haslett*, of a part of the said property belonging to the estate of *Doctor Haslett*, and which is in controversy in this suit, it is not competent to him now to deny in this action the legality of said sale, and that he is not entitled to recover more than he would have been entitled to recover, if said sale had been in every way legal and proper, which opinion and instruction the Court refused to give. The defendant excepted.

3. In addition to the testimony stated in the two preceding bills of exceptions, the defendant further offered in evidence, that letters of administration *c. t. a.* on the estate of the said *William Haslett*, were duly granted him in the State of *Delaware*, on the 14th of February, 1815, and proved that the property of the said *Doctor Haslett* in controversy in this suit, was, after the issuing of the said *Delaware* letters of administration, and after, the defendant had also obtained letters testamentary upon the estate of *Ann Haslett*, and before the plaintiff obtained his letters of *adm. de bonis non*, upon the estate of said *Doctor Haslett*, out of the Orphans Court of *Baltimore* county, taken possession of, and sold by defendant, as ex'r of said *Ann*, at the sale at public auction mentioned in the preceding exceptions. Whereupon the defendant prayed the opinion of the Court to the jury, that upon the whole evidence aforesaid, if they believe it, the said possession and sale, so as aforesaid taken and made, by said defendant, of said property of *Doctor Haslett*, was so far legal and valid as not to render the said defendant liable in this action to the plaintiff. Which opinion, the Court refused to give, the defendant excepted; and the verdict and judgment being against him, he prosecuted the present appeal.

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The cause came on to be argued before BUCHANAN, Ch. J., EARLE, and MARTIN, J.

Taney, (Attorney Gen'l) and *Johnson*, for the appellant, contended:

That assuming from the evidence, that the appellant was executor *de son tort*, he is entitled to *recoupe* in damages, the amount paid by him, as stated in the 1st exception.

The debt paid by the appellant did not cease to be the debt of *William Haslett*, when *Ann*, his executrix, gave her notes for the amount, it still continued a claim against his estate, which was not discharged from it, until the money was paid by *Glenn*.

Ann Haslett had no authority over the property in controversy, except as executrix of *William Haslett*, and upon her death, the right passed to the administrator *de bonis non* of *William*. The appellant, as the administrator of *Ann*, had no title to interfere with it, and consequently, by taking possession and selling, he became executor *de son tort*, and as such, had a right to set off payments made by him, on account of *William's* estate. *Tobey vs. Barber*, 5 Johns. Rep. 63. *Johnson vs. Weed*, 9 Ib. 310. *Kearslake vs. Morgan*, 5 Term. Rep. 513. *Puckford vs. Maxwell*, 6 Ib. 52. *Toller's Ex'rs*, 365. Ib. 363. *Bishop vs. Rowe*, 3 Maul. and Selw. 362. *Burdick vs. Green*, 15 Johns. Rep. 247. *Gallagher vs. Roberts*, 2 Wash. C. C. Rep. 191. *Ins. Co. vs. Smith*, 6 Harr. and Johns. 166. *Bower's Adm'r vs. The State*, 7 Ib. 32. *Clopper vs. Union Bank*, 7 Ib. 92.

The second exception they abandoned.

On the third exception, they insisted, that the letters granted the appellant in *Delaware*, are sufficient to protect him, in an action sounding in damages. When the appellant took possession of, and sold the property, in virtue of his *Delaware* letters, administration had not been granted appellee in this State, the former therefore cannot be punished as a trespasser, for an act done under such circumstances.

The decisions have gone no further than to make administration in the State necessary, in order *to sue* in a representative character. There is no evidence of the place of *Haslett's* death, except what is furnished by the letters themselves.

Samuel I. Donaldson and *Belt*, for the appellee, submitted on notes. Upon the *first* exception they contended, the appellant was not sued as executor *de son tort*, but in his individual capacity, he had not taken possession of the property as belonging to *Dr. Haslett's* estate, or for the purpose of administering the estate of *Haslett*, and he does not now claim the property under any trust connected with *Dr. Haslett's* estate, but as executor of *Mrs. Haslett*. He claims the property in opposition to any right of first testator, (*Dr. H.*) or those claiming under him. How then can he claim to *recoupe* in damages? This view of the subject has been recognized and sanctioned by *Fishwick vs. Sewell*, 4 *Harr. and Johns*. 429; where it is declared that defendant could not *recoupe* in damages, because he claimed negroes *in his own right, and in opposition and disclaimer of the trust* under which they were confided to him.

If the appellant is to be considered as “executor *de son tort*,” he can only retain for debts paid in the *usual course of administration*. Was the payment of a debt due from *Mrs. Haslett*, a debt paid in the usual course of administration of *Dr. Haslett's* estate? Certainly not. The debt due from *Dr. Haslett* to *Heslip* had been paid by his executrix, and she was allowed for it in her accounts with the *Orphans Court*, as appears by the record. But if it be a debt against *Dr. Haslett's* estate, to enable the appellant to have any benefit from it in this action, he must shew the solvency of *Dr. Haslett's* estate. If he claims to *recoupe* in damages, it must be on the ground that he was acting as the executor of *Dr. Haslett*. He must of course shew that it was properly, regularly and legally paid, *and without injustice*

to other creditors. The law obliges executors and administrators to a distribution of assets. Judgments would be preferred to such a debt as this is represented to be, and after judgments, the personal estate is answerable to all creditors alike. *De Sobrey vs. De Laistre*, 2 Harr. and Johns. 224. In *Mountford vs. Gibson*, 4 East. 445, *Ld. Ellenborough* says, "that when it is laid down generally, that payments made in the due course of administration by one who is executor *de son tort* are good, that must be understood of cases where such payments were made by one who is proved to have been acting *at the time*, in the character of executor; apply this principle to this case. Here the payment made to *Heslip*, was made by the executor of *Dr. Haslett*, who was rightfully and properly in the possession of the testator's estate. Her notes endorsed by defendant and his brother, as co-partners, were accepted by *Heslip*, and she, as before stated, was allowed for payment, as executrix. Defendant was not *then* in possession of *Dr. Haslett's* estate, he had nothing at that time to do with it. It was not until *Mrs. Haslett's* death, that he intermeddled with it, and when he paid the notes given by *Mrs. Haslett*, he did not pay them as claiming against *Dr. Haslett's* estate, for they were not so presented to him, but he paid them as claims against *Mrs. Haslett*, whose executor he was. He was not, therefore, acting as administrator of *Dr. H.*, but as executor of *Mrs. H.* He did not take the goods to administer as the property of *Dr. H.*, but as belonging to *Mrs. H.* He did not apply them to the payment of a debt due from him, but to a debt due from her. How then can this be a payment in the usual course of administration of *Dr. Haslett's* estate? In 1 *Ventris*, 349, it was held that the payment of a debt by an executor *de son tort*, "was no discharge against an administrator, for men must not be encouraged to meddle with a personal estate without right." More especially can it not be done in this case, "as the same can be adjusted on final settlement of the estate," "if the parties should elect to go

into such adjustment." *Fishwick vs. Sewell*, 4 Harr. and Johns. 429.

Again, an executor *de son tort* cannot retain for debt of his own. Here he was personally responsible on the notes given by *Mrs. Haslett*, and he paid the money as her executor, and also to save his individual responsibility, which is equivalent to retaining for debt of his own. *Toller*, 365. *Heslip* did not present his claim to appellant, as executor of *Dr. Haslett*, nor did appellant pay it as such. If there was any claim against *Dr. Haslett's* estate, by appellant, it was after the payment by him of a debt for which he was personally liable, and if *Dr. H's* estate was to be liable at all, it must be to appellant as a creditor. If so, he surely cannot retain, because it is a debt of his own. 2 *Black. Com.* 511. *Coulter's case*, 5 Co. 30. Before appellant can claim to retain this debt, or *recoupe* it in damages, he must not only shew, that it was properly a debt due from *Dr. Haslett's* estate, and paid by him in the due course of administration, and that the estate was solvent, but the court must also be satisfied, (and the *onus* of proof would be on appellant,) that the goods, whose value was found by the jury, *were all the goods of Dr. Haslett* which came to appellant's possession. It is not now recollected whether the record shews the difference between the *goods declared for*, and *those proved* to be in appellant's possession. But it is contended, that in order to enable him to retain under any circumstances, he must shew that the verdict of the jury comprehended all the property of *Dr. Haslett* in his appellant's possession, or which had been in his possession.

It is not denied that the acceptance of a promissory note by a creditor, for a precedent debt, would not operate as an extinguishment of the original cause of action, unless it was so accepted by the creditor. It is not denied, that if the note so given be not paid, that the creditor might proceed against his debtor on the original cause of action. But it would seem that this is a right limited to the creditor, on the non-payment of the note. In this case, the notes

given by *Mrs. Haslett* to *Heslip* were paid. Could *Heslip* after that payment, have recovered his original debt from *Dr. Haslett's* executors? If he could not, can any one else do so? There was no assignment from *Heslip* to appellant. If surety at common law, pays debt of his principal, he may recover from his principal. Appellant was not surety for *Dr. Haslett*, but for *Mrs. Haslett*, acting in her individual capacity. If he paid it as her surety, he must look to her estate. The debt was paid to the creditor of *Dr. Haslett*, by the executor of *Dr. Haslett*. The mode of payment cannot vary the principle. It is still a payment to the creditors, not a purchase from him of the debt; for had it been a purchase, there would have been an assignment from him. The cases cited by counsel of appellant do not, it is thought, apply to the circumstances of the case.

When a note is given for a pre-existing debt, it is to be considered as collateral security for the debt, or a discharge of the debt, according to the agreement between parties: see appellant's authorities. What the agreement between the parties was, in this case, was a question for the Court, the only evidence offered, being the *written instrument* produced by appellant.

There are no words in the *receipt*, to restrain the meaning of the term payment: does not this term, in its usual acceptation, denote an *absolute* payment and *discharge*, as fully as if those words were used?

The authorities cited by appellant, shew that when a note is received for a pre-existing debt, it extends the time for payment of the debt, until the note becomes due; the notes in this case, were both paid before due, and a smaller sum than their amount taken in discharge of them, as appears by the receipts upon them. The debt then, from *Dr. H's* estate, was not payable at the time when the notes were paid, and could not have been sued for by *Heslip*.

The only effect produced by the payment of *A. H's* notes, was to substitute her executor in the place of *Heslip*, the original creditor, and create a debt from the estate of *Dr.*

Haslett, to the appellant, as executor of *A. H.*; and he stands in precisely the same situation in which he would have stood, if the notes of *A. H.* had extinguished the debt to *Heslip*, when they were first given. He is a creditor of the estate of *Dr. H.*, seeking to discount his debt from the amount to be recovered in this action. Whether the debt be due to him individually, or as representative of another, can make no difference; the maxim of law that no man shall take advantage of his own wrong, equally applies. And the policy of the law which prohibits a retainer for his own debt, by an executor *de son tort*, would be equally invaded, whether the debt were due to him in his individual, or in a representative capacity.

The *second* exception being abandoned, the views of the appellee's counsel are omitted.

3d EXCEPTION. The Courts of Maryland cannot recognise administration granted in another State. Such letters give no authority. The administrator so appointed cannot sue, cannot exercise any right, power or control over the personal estate of the deceased, in this State. Letters of administration granted by another State, are considered here as mere nullities. *Act of 1813, ch. 165*, by which power is given to persons having letters testamentary, or of administration in the District of Columbia, to prosecute and recover claims in this State. It is declaratory of the received law on this subject. *Fenwick vs. Sears' adm'rs*, 1 *Cranch*, 259; as strong a case in support of the principle here contended for, as could well be presented to the Court. When the letters of administration in that case, were first granted, their operation extended to the *District of Columbia*, but after the cession, they were considered by the Supreme Court of the United States, as of no authority or validity there. The case of *Morrel and others vs. Dickey*, 1 *Johns. Ch. Rep.* 153, is to the same effect. *Chancellor Kent* says, "it is well settled, that we cannot take notice of letters testamentary, or of administration granted abroad, and that they give no authority to sue here;" he also says, "this

case (where a guardian appointed by the *Orphans Court of Philadelphia* was the complainant) is within the reason of the rule," and refers to *Fenwick vs. Sears, and Goodwin vs. Jones*, 3 *Tyngs' Rep.* 514, and *Riley vs. Riley*, 3 *Day*, 74. If our Courts cannot notice foreign letters of administration, no act can be valid under them; for it will be recollected, that administrator derives his right from the letters of administration only, and not from any act of the deceased. Appellee could not, therefore, by virtue of letters granted in *Delaware*, justify the taking of the goods and chattels of *Dr. Haslett*, but is answerable to the appellee in the same manner, as if no such letters had been granted.

There is no legal evidence of such letters in this cause, they should be produced, or their absence accounted for to authorise secondary evidence to prove their character and contents. The act of Congress of May 26, 1790, *ch.* 11, says, that records and judicial proceedings are to be certified, &c. In this case, the record and judicial proceeding itself, is not certified. It is merely stated, that there were such proceedings, without sending the record or certifying it.

BUCHANAN, Ch. J., delivered the opinion of the Court.

There are three bills of exceptions, upon which this case is brought before this tribunal.

The suit is an action of *Trover*, by the appellee as administrator *de bonis non*, of the estate of *William Haslett*, with the will annexed, for certain goods and chattels which belonged to *William Haslett*, his testator, and were left unadministered by *Ann Haslett*, deceased, whom in his will he constituted his executrix.

The *second* exception was abandoned in the argument, by the counsel for the appellant, and clearly could not be sustained. The prayer assumes the fact that the appellee was a purchaser, at a sale by the appellant, as executor of *Ann Haslett*, of a part of the property belonging to the estate of *William Haslett*, and in controversy in this suit, (though

without stating what part of the property in controversy,) and upon that assumption, asks the opinion of the Court to the jury, that the appellee is not competent to deny the legality of the sale, nor entitled to recover the value of the property so assumed to have been bought.

Now besides, that whether there had been such a purchase or not by the appellee, was a matter proper to be left to the jury, the fact assumed does not appear in this part of the cause. There is no evidence connected with this bill of exception, that the appellee ever purchased any part of the property in controversy, or any goods that belonged to the estate of *William Haslett*, and the Court could not have done otherwise than reject the prayer, even if the fact assumed, had it been proved, would have justified such a direction. But if, in point of fact, the appellee did in November, 1814, purchase at a public sale by the appellant as executor of *Ann Haslett*, a part of the property, for which this suit was brought, it by no means follows that he should not for that reason, be permitted to deny the propriety, or legality of that sale, nor entitled to recover *quo ad* the property so sold. He was not then the *administrator de bonis non* of the estate of *William Haslett*—his letters of administration were not issued until the 21st July, 1821, more than six years afterwards; and there is no proof in the record, that he knew any part of the goods sold to have been the property of *William Haslett*, if in truth they were, or that he intended in any manner to intermeddle with that estate. He did no wrong himself, and did nothing to lead the appellant into any error, nor was there a semblance even of any management or collusion between them. He was as a mere stranger, and had the same right to purchase at a public auction, that any other had; and there is no reason why the appellant, who sold the goods as the executor of *Ann Haslett*, and received the fruits of that sale, should be protected against a recovery of the value, in an action of trover by the appellee, who afterwards became the *administrator de bonis non* of *William Haslett*, by the mere fact,

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that he was himself the purchaser, under circumstances calculated to induce the belief that they belonged to the estate of *Ann Haslett*. It is of no consequence who was the purchaser. The appellant wrongfully taking and selling the goods, became answerable for their value; to which the appellee, on obtaining his letters of administration, became entitled, as the legal representative of *William Haslett*, and it is not a case within the principle, upon which *Whitehall vs. Squire* was determined in *Carth.* 104, where the plaintiff having received from the defendant, a horse that belonged to the intestate for services performed about the funeral of the intestate, at defendant's request, afterwards administered on the intestate's estate, and brought an action of *trover* against the defendant, for the value of the horse so received by him before he administered; it was decided by two judges against *Holt*, that he was not entitled to recover, because he was a *particeps criminis*, in the very act of wrong complained of, the intermeddling with the estate, and receiving a part of it in discharge of a claim, from the hands of one, having no authority to deliver it. There is no pretence of any such intermeddling by the appellee here.

The third exception rests upon the legal effect of letters of administration with the will annexed, of the goods and chattels of *William Haslett*, granted in the State of *Delaware* to the appellant. By the testamentary system of this *State*, the manner in which assets are to be distributed is prescribed, and the administrator is to give bond and security, and render an account of his administration in the Orphans Court. And it is the settled and well known law of the *State*, that letters testamentary, or of administration granted in another *State*, give no authority to sue, or to administer assets here. Our Courts can take no notice of letters testamentary, or of administration granted abroad; and the same law prevails generally in this country, and it is also the law of *England*. If that be the case, and we can take no notice of the letters of administration granted to the appel-

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lant in the State of *Delaware*, how can they have the effect to make legal and valid, any possession taken, or sale made of the property of *William Haslett* by the appellant, and to exempt him from liability in an action by the rightful administrators. So far as concerns his liability in this suit they are as blank paper, and cannot legalize acts otherwise tortious ; it is as if he had no letters, and could not therefore rightfully take possession of, and sell the property of *William Haslett* ; but in doing so without any authority known to the laws of the State, was a wrong doer, and cannot protect himself under cover of that, which gave him no authority to act. Moreover, for aught appearing in this exception, the appellant did not take possession of, and sell the property, under any supposed authority derived from the *Delaware* letters of administration ; on the contrary, the proof as set out in the record is, that he took possession of the property in controversy and sold it, as the executor of *Ann Haslett*, which he could not do under letters of administration upon the estate of *William Haslett*. The Court therefore did right in refusing to direct the jury as prayed ; “that the possession, and sale so proved, of the property in dispute by the appellant, was so far legal and valid, as not to render him liable in this action to the appellee.”

We come now to the consideration of the first exception, which presents the only remaining question in the cause to be disposed of, and that is, whether under the evidence stated in this bill of exception, (out of which we cannot look to the testimony contained in any other exception, and not connected with this) the appellant was entitled to have *recouped* in damages, the payments made by him to *John Heslip*, who was a creditor of *William Haslett*. This being an action of *trover* by the rightful administrator for the value of the goods mentioned in the declaration.

The proof as stated is, that the goods belonged to *William Haslett* the testator of the appellee ; and after his death were taken by the appellant and converted to his use. That *William Haslett* died indebted to *John Heslip*, in the sum

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of \$1261 40; that *Ann Haslett*, executrix of *William Haslett*, on the 4th May, 1814, gave to *John Heslip*, her two promissory notes endorsed by *John W. Glenn & Co.* in whose favor they were drawn, one for \$612 85, payable six months after date, and the other for \$648 55, payable eighteen months after date, making together the sum of \$1261 40, the amount of his account against *William Haslett*; at the foot of which account, he wrote a receipt for the notes so given him, which is in these words: "received of *Mrs. Ann Haslett*, executrix of *William W. Haslett*, two promissory notes signed by herself, and endorsed by *John W. Glenn & Co.* in payment of the above account." That afterwards and before the institution of this suit, the appellant, as executor of *Ann Haslett*, paid to *John Heslip*, the amount of each of those notes. For these payments he claimed to be allowed at the trial, out of the value of the property in dispute, which the Court refused to permit, on the ground that the notes given by *Ann Haslett*, and received by *John Heslip* for the amount of his claim against *William Haslett*, extinguished that debt, and made him the creditor of *Ann Haslett* for the amount of his notes, with no remaining claim against the estate of *William Haslett*.

The first enquiry then to which our attention is directed, is as to the legal effect, and operation of the acceptance by *John Heslip* of the notes of *Ann Haslett*, so given and received by him. And in the absence of all evidence upon the subject, except the receipt of *John Heslip*, at the bottom of his account, we think it clear, that his acceptance of *Ann Haslett's* notes did not extinguish his claim against the estate of *William Haslett*. The general rule is, that the acceptance of a security or undertaking of equal degree, is of itself no extinguishment of the former debt. Thus the acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, (both being of equal degree in the eye of the law) if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled,

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or show it to be lost. But he will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial to be cancelled. So too, the acceptance by a creditor of a note, or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time. *Kearslake vs. Morgan*, 5 Term. Rep. 513. *Puckford vs. Maxwell*, 6 Term. Rep. 52. *Bishop vs. Rowe*, 3 Maul. and Sewl. 362. *Swinyard vs. Bowes*, 5 Ib. 62. *Burdick vs. Green*, 15 Johns. Rep. 247. *Ins. Co. vs. Smith*, 6 Harr. and Johns. 166, or unless in either of the cases put, there is an express agreement by the creditors to receive it absolutely as payment, and to run the risk of its being paid. In which case it is to be taken, as an extinguishment, or payment of the precedent debt, whether the note or bill be afterwards paid or not. *Clark vs. Mundal*, Salk Rep. 124. 7 Term. Rep. 60. *Tobey vs. Barber*, 5 Johns. Rep. 68. *Johnson vs. Weed*, 9 Ib. 310.

The expression, “in payment of the above account” at the end of *John Heslip’s* receipt for *Ann Haslett’s* notes are the only words used, that can be supposed to have any tendency to show that he had agreed to receive them in full and absolute discharge of his prior debt, and to take upon himself, the risk of their being paid, or not; which is the agreement necessary to be proved, to give to his acceptance of them, the effect to extinguish the pre-existing debt, (the notes having never passed from his hands until taken up by the appellant) and for that purpose his receipt is relied upon. But it would be going very far to say, that the mere use of the words, “in payment of the above account,” furnishes proof of such an agreement. It could be but an inference, and that stronger than the words will bear, or the character of such transactions justify. If there had been any such agreement, the presumption is, (if presumption can be indulged in) that it would have been

stated in the receipt. The very negotiation upon the subject would have indicated the expediency of its being so stated. And in the absence of any such statement, are we at liberty to infer it? And infer it from what? Not from that, which (in the ordinary use of the terms) naturally points to such an agreement, and which if unexplained, would admit of no other fair inference; but from that, which looking to the character of such transactions, may well be understood to have been intended, as an acknowledgment only, that the notes were given for, and on account of the precedent claim against the estate of *William Haslett*; to show what was the consideration of the notes, and to furnish *Ann Haslett* the executrix, with a necessary document in the settlement of her accounts; not an acknowledgment that the original debt was absolutely paid, nor of an agreement to take the notes in absolute payment, and to discharge the estate of *William Haslett* from all further liability; but only that the notes when paid, should be in discharge of the original debt, showing on what account they were given, and to prevent a recovery on both causes of action.

This would seem to be the fair understanding of the receipt, no motive appearing to induce *John Heslip*, to take the notes in full and absolute payment, and to discharge the estate of *William Haslett*. And it is believed to be in accordance with the usual understanding of such receipts, creditors not being presumed when they take the notes of third persons, on account of precedent debts, to intend to receive them in absolute payment, and extinguishment of such debts; but only *sub modo*, that is, in the event of their being paid, unless otherwise expressed in the receipts, and we are not without judicial decisions in consonance with this view of the subject.

In *Keaslake vs. Morgan*, 5 Term. Rep. 513, it was conceded, that a promissory note of a third person accepted, and received by a creditor, "for, and on account of a debt due him," was not of itself an extinguishment of that debt.

And what is a receipt of a note in payment of a debt, more than a receipt for, and on account of a debt. Money received for, and on account of a debt, is received in payment of it.

In *Puckford vs. Maxwell*, 6 Term. Rep. 52, where the plaintiff had accepted a bill in part payment of his debt, *Ld. Kenyon* said, “if the bill which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it, expects it to be, and therefore we may consider it as a nullity, and act as if no such bill had been given.” There the fact of a note being given in payment, was held not to be an extinguishment of the debt. And what is this receipt more than an acknowledgment, or evidence of the same fact, that the notes were given in payment.

The same principle has been followed out in the Courts of *New York*. In *Tobey vs. Barber*, 5 Johns. Rep. 68, there was a receipt by a landlord to his tenant in these words, “received of *Ralph Barber* \$163 on account of the within lease, and in full for the second, and third quarters rent.” It turned out in evidence that the sum of \$163, mentioned in the receipt was made up in part of money paid by the defendant to the plaintiff, and in part of a note of a third person given to the plaintiff, and it was decided, that there was no evidence that the plaintiff agreed to run the risk of the solvency of the maker of the note, and to take the note in absolute payment, except by inference arising from the receipt, which was not enough to establish such a positive agreement. There was a receipt in full purporting to be for cash, which might have afforded some ground for supposing that the plaintiff intended to treat the note as cash, and to put it on the same footing with the money received, which as far as it went, was a discharge of so much of the rent. It is a stronger case than this.

In *Johnson vs. Weed, and another*, 9 Johns. Rep. 310, where the plaintiff having sold goods to the defendants, received the note of a third person for the amount, and gave

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the defendants a bill of the goods, with a receipt in full at the bottom, it was held that the terms of the receipt were not decisive, and it might be understood, consistently with the words of it, that the note was received in full, under the usual condition of its being a good note.

And in *Putnam vs. Lewis, adm'r of Lewis*, 8 Johns. Rep. 389, where the plaintiff having a demand against the estate of the defendant's intestate, received the defendant's promissory note for the amount, and gave him a receipt in these terms, "received of *George R. Lewis*, \$53 96, it being in full of all demands which I have against the estate of *Eber Lewis*, deceased," it was decided that the note was no payment of the debt. That case and this, are nearly identical, and if there be a difference, that is the strongest case. There can be no real distinction between a receipt in full of all demands, and a receipt in payment of all demands. In both cases the notes were given by the representatives of the deceased, for debts due from the deceased, and the only difference is, that in this, the receipt is for the notes themselves, and in that case the receipt was for the money, specifying the amount, and so far at least, treating the note, (which was all that was in fact received) as money.

To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shown; an express agreement to receive it as payment, and to run the risk of its being paid, which is not sufficiently done by the receipt in this case, to justify us in saying that the claim of *John Heslip* against the estate of *William Haslett*, was extinguished by his acceptance of *Ann Haslett's* notes.

Considering then, the claim of *John Heslip* as not extinguished until the notes of *Ann Haslett* were paid, but his right of action only suspended during the period allowed for the payment of the notes, was the appellant who made the payment, entitled to have them *recouped* in damages.

It has been suggested by the counsel for the appellee, that it is incumbent on the appellant to entitle himself to the

allowance he claims, to show the solvency of the estate of *William Haslett*. No question appears to have been raised in the Court below upon that subject, and it will be considered here as if there was no deficiency, indeed it is not suggested, nor does there appear to be any deficiency; treating it then, as a case clear of all question relative to the sufficiency of assets, if it was a suit by a creditor of *William Haslett*, there could be no doubt, on the plea of *plene administravit*, that he would be entitled to an allowance for the payments made to *John Heslip*, if they are to be taken as payments of *John Heslip's* claim against the estate of *William Haslett*.

There are acts of intermeddling, such as locking up the goods of a deceased person for safe keeping, which will not charge a man as executor of his own wrong; but the taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands. But as against creditors he is justified, in paying the debts of the deceased; and if sued by a creditor he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot, in any case, retain any part of the goods of the deceased in satisfaction of a debt due to himself. There is, however, a difference between a suit by a creditor, against an executor *de son tort*, and one by a rightful executor or administrator. If the action by the latter be *trover* for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts. But on the general issue pleaded, he may give in evidence such payments, and they will be *recouped* in damages, if they be such as the plaintiff would have been bound to make, or in the language of some of the books, made in due course of administration. *Carth.* 104. *Bull. N. P.* 48. 2 *Blk. Com.*

507. *Mountford vs. Gibson*, 4 *East. Rep.* 441. *Toll. L. Ex'rs*, 363, 364. *Parker vs. Kelt*, 12 *Mod.* 471.

What then is this case? We have already said, and attempted to show, that the acceptance of *John Heslip*, of the notes by *Ann Haslett*, was not a payment or extinguishment of his claim, against the estate of *William Haslett*, but that the original debt continued, notwithstanding the receipt of those notes. Had *Ann Haslett* paid those notes, she would, by doing so, have discharged the original debt—and the payments having been made by the appellant as her executor, makes no difference. They were her notes, and he as her executor was bound to pay them, if assets sufficient came to his hands; and in paying them, he paid the original debt, on account of which they were given. It is not the payment of the notes, as the debts of *Ann Haslett*, on which his claim to *recoupe*, rests; but the payment of the original debt that remained in force, until discharged by him, with which the amount of the notes was identical. Where it is said that the payments to be *recouped* in damages, by an *executor de son tort*, in *trover* by a rightful executor or administrator, must be such as are made in the due course of administration, it is meant, such as the rightful executor or administrator would have been bound to make, as where the debts were just, and no deficiency of assets. And that is this case. The payment by the appellant of the claim of *John Heslip*, against the estate of *William Haslett*, was such as the appellee would have been bound to make, and we think he was entitled to have the amount *recouped* in damages.

The cases of *Mountford, adm'r of Holland vs. Gibson*, 4 *East.* 441, and *Fiswick vs. Sewell*, 4 *Harr. and Johns.* 399, referred to by the counsel for the appellee, are not like this.

We *concur* with the Court below, in the 2d and 3d exceptions, but *dissent* from the opinion expressed in the 1st, and therefore reverse the judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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ABATEMENT.

1. Under the 11th section of the act of 1785, ch. 80, it is the duty of the court to continue a cause standing under a rule of reference, until an award is returned. The death of both parties, while it remains under that rule, does not abate the action. *Price vs. Tyson*, - 475
2. When the parties to a cause, standing under a rule of reference, die before an award returned, and there is ground to warrant the County Court in reinstating the cause upon the trial docket, the regular course is to move for its reinstatement in the name of the original parties; when that is ordered, their death should next be suggested, then their representatives summoned to appear, and upon their appearance, the cause proceeds as in other cases. - - - - *Ib.*

ACTION—RIGHT OF.

1. An agreement by the distributees of the personal estate, to refund to the administrator the amount paid by him, to the creditors of the deceased, beyond assets, is the subject of a special action on the case at law, not of a bill in equity. *Gibbs vs. Clagett*, - - - - 14
2. The permanent trustee of an insolvent debtor must give bond with security, before he can maintain an action in that character. *Winchester, trustee of Williams and Gooding vs. Union Bank*, - - 73, 79
3. D gave a note to W for his accommodation, who endorsed it to S, for the full value. At the time S advanced the money, R was present and pledged his word to S, that if the note was not paid at maturity he would pay it. The note not be-

ing paid, S brought suit against D; pending the suit R made S several payments on account of the note, and at the last payment received from S a receipt, concluding as follows: "which is in full of a note held by me against D, now in suit, and proceeds of the same properly belonging to said R." A few days before the trial of the cause and some months after the last payment, the suit was entered on the docket for the use of R. It appeared that R was entitled to the beneficial interest in the note, and that S had no other interest, than what arose from an obligation to prosecute the suit to final judgment, for R's use. **HELD:** that as the payment to S was not made by D, or on his behalf, that the suit could be carried on for R's benefit as the equitable assignee. *Williamson vs. Allen*, 344

4. An action instituted by L, upon a single bill payable to "L, executor of B," is an action in his own right, to which a debt due from him may be pleaded, and proved as a set-off; and he cannot go into evidence of the consideration of the bill, to shew that it was given for a debt due B, in order to exclude the set-off as due in another right. *Turner vs. Plowden*, - - - - 455
- See Assumpsit.*

ACTS OF ASSEMBLY.

1. By the *Act of 1826, ch. 251*, declaring that "It shall not be lawful for any person within this State, to have in possession any ticket of any lottery, not granted or permitted by this State, with intent to sell, negotiate or dispose of the same, to sell, negotiate, or advertise in any way whatever, any such ticket or part of a ticket, &c." it was the

great object of the legislature to prevent the sale of unauthorised tickets, and for that purpose the law prohibited both the possession of such tickets with intent to sell, and the selling of them: *Held*, therefore, that the word "*such*," did not refer to the possession of the seller, as part of the description of the ticket which it would be unlawful to sell, for that would legalize the selling of tickets by any person, who at the time of the sale had not possession, and defeat the obvious intent of the law. *State vs.*

Scribner and Barker, - - - 246

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APPEAL.

1. Prior to the act of 1825, ch. 117, it was the duty of the Court to no-

tice errors apparent on the face of the record, or any legal objections to evidence set out in the record, although they were not brought into the view of the Court below, nor formed any part of the bills of exceptions. *Mundell vs. Perry*, 193

2. Where the declaration charged that the defendant, the close of the plaintiff's, called —, situate, &c. broke and entered, and defence having been taken on warrant, and neither the warrant, nor any of the proceedings under it, gave any name to the close of the plaintiff, the Court refused to affirm a judgment rendered for the plaintiff, prior to the act of 1825, ch. 117, upon proceedings thus defective on their face. - - - - - *Ib.*

3. This Court, since the Act of 1825, ch. 117, so far as regards the common-law cases, is strictly an appellate Court, deciding every cause upon the question submitted below, and upon none other. *Davis vs. Leab*, 302

4. So where after the evidence had been all offered in the County Court, the defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover, and the Court gave the instruction, but the record did not show the point upon which that Court acted, this Court can neither reverse nor affirm—in such case the appeal must be dismissed. - - - - - *Ib.*

5. It is not necessary, under the Act of 1825, ch. 117, to file exceptions to the Auditor's report, to take advantage of objections in the Appellate Court, which the pleadings in the cause put in issue, and which do not depend upon the state of the accounts, though an account may be ultimately necessary to ascertain the extent of the claim. *Wells vs. Beall*, - - - - - 453

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ASSIGNMENT.

1. The common law restrains the assignment of an entry for a condi-

tion broken, where, after the forfeiture incurred, the estate may continue; but it allows it, where the violation of the condition puts an end to the estate of the particular tenant. *Gwynn vs. Jones*, 173

2. It is a case of constant occurrence, where a grantor, having a right of entry on land, conveys it to another, and therewith, necessarily, the power to maintain an ejectment for it. - - - - - *Ib.*

Assignment of a mortgage without delivery, valid under certain circumstances. *Vide* Court of Chancery, 7.

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— Contract, 7.

ASSUMPSIT.

1. In an action to recover the price of a pew, sold at public auction, against the purchaser thereof, the plaintiffs having established the sale, is not obliged to prove his title to enable him to recover. *Stoddert vs. Vestry of P. T. Parish*, - - - 227
2. Where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the *tort*, and sue in *assumpsit* for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the *tort*, and then recover their value, for the time of their detention, in *assumpsit*. *Stockett vs. Watkins' Adm'r*, - - - - - 326

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See Promissory Note.

BOND.

1. A recital in the condition of a bond may restrain indefinite expressions used in it, and adapt them to the intention of the parties. *State vs. Wayman*, - - - - - 254
2. Where a surety is sued upon a bond, the utmost that can be recovered is the penalty, and legal interest thereon, by way of damages for the detention of the debt from the time the debt is demanded—that is the import and effect of his contract,

and his accountability cannot be stretched beyond it. - - - *Ib.*

3. It is not in every case that interest by way of damages is to be recovered on the penalty, and when the case occurs, it may be considered as an exception to the general rule, which limits the recovery by the penalty in the bond. - - - *Ib.*
4. Where a jury is called upon to assess the damages for breaches assigned or proved under the condition of a collateral bond, and are wholly unauthorised by the issue to find damages for the detention of the debt, a recovery must be limited to the penalty of the bond. *Ib.*
5. Where various persons have distinct demands secured by the same bond, a recovery and payment in one suit, can be no bar to other actions, in which the several claimants may recover to the same extent, and can only be limited by the penalty, and in particular cases by the penalty and interest. - - *Ib.*
6. Any bond required by law to be given by an executor or administrator, by reason of the assumed representative character of executor or administrator, and to secure the payment of debts and legacies, or the faithful administration of assets, is a testamentary or administration bond, as the case may be. *State vs. Boyd*, - - 365
7. The sound legal construction of the condition of an appeal bond, is, that it is an undertaking to reverse the decision appealed from, or satisfy the judgment of the appellate Court. *Kurthaus vs. Owings*, 430

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CONSIDERATION.

1. The consideration of natural love and affection is sufficient in a deed, but a mere executory contract, cannot be supported on the consideration of blood, or natural love and affection. There must be some-

thing more, a valuable consideration, or it is not good, and cannot be enforced at law, but may be broken at the will of the party.

Pennington vs. Gittings, - - 208

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— Promissory Note, 3, 7.

CONSTITUTIONAL LAW.

1. All appointments to office, under the constitution, by the executive of the State, are made by the authority of the 40th, 48th and 49th sections, and the Register in Chancery not being commissioned during good behavior, is necessarily an officer of annual appointment, under the 49th section. *State vs. Wayman*, - - - - - 254
 2. The tenure of his office being limited, he cannot continue to act after his term expires, except in the single instance of the appointment of a successor, in which case he may act until such successor, commissioned in his stead, is qualified. If re-appointed, he may continue to act without any new commission or qualification, but unless re-appointed he is not legally an incumbent of the office, and cannot lawfully perform any of its duties. *Ib.*
 3. Where the constitution limits the duration of an officer to a certain term, no irregularities in the proceedings of the appointing power, can extend it beyond that period, *Ib.*
 4. The constitution is to be construed with reference to the laws existing at its adoption, and the practice under them. - - - - - *Ib.*
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CONSTRUCTION.

Statutes are sometimes extended to cases not within the letter; and cases are sometimes excluded from the operation of statutes though within the letter; on the principle that what is within the intention of the maker of a statute, is within the statute, though not within the letter, and that what is within the letter of the statute, and not within the intent of the maker, is excluded, it being an acknowledged rule in their construction, that the intention of the maker ought to be regarded. *State vs. Boyd*, - - 365

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CONTRACT.

1. An Insurance Company having elected to rebuild a mill destroyed by fire, which they were bound to complete within a reasonable time, contracted with S on the 15th October, 1824, who agreed to rebuild and complete it on or before the 1st June next thereafter, for which he was to be paid "\$800 in hand, and \$1000 on the 1st December next, continuing as the work progressed, the payment of \$1000 on the first day of each following month, until the 1st July inclusive, provided the work shall then be finished." On the 16th December, 1824, S drew an order on the Company in favor of the Millwright, which authorized the Company to retain \$750 out of the last payment to be made to him, and to pay it over to the Millwright; as soon "as he is completely finished, agreeably to his contract." This order was accepted by the Company. In an action by the Millwright upon the order, it appeared that he had finished his part of the work according to his contract with S—that the owners of the mill were satisfied with the character of his work—that the mill, however, was not finished until January, 1826—that the Company retained the last \$1000, which they were to pay S, to answer a suit which the proprietors of the mill had brought against them, for an alleged violation of S's contract. HELD, that upon the true construction of the order, the plaintiff was entitled to receive the \$750 from the Company, only in the event of S becoming entitled to his last instalment, out of which it was to be paid—and that although time is not generally considered to enter into the essence of a contract; yet, in this case, it ought to have that effect, by reason of the Company's liability to the assured to rebuild in a reasonable time. *Kemp vs. Baltimore Fire Insurance Company*, 108
2. Upon a bill being filed to recover the value of certain negroes, which

- M held in trust for the complainant, and which had been sold through the intervention of an agent who considered himself entitled to the proceeds, it was agreed between M and the agent, that if M would delay settlement and permit the agent to retain the money, and defend the bill, he would indemnify him from all loss. A final decree having passed against M, in an action brought upon his contract of indemnity, HELD, it was competent for the defendant to give in evidence, that he had apprised the plaintiff in due time of the nature of the defence, which he desired should be made to the suit, and of the sources by which he meant to establish it, so as to enable the plaintiff, by resorting to such evidence, to ascertain if he could be justified in putting in such an answer as was desired; and also to show that the plaintiff had failed to comply with his contract, by refusing to permit him to defend the bill. *Morris vs. Chapman*, - - - - - 286
3. If the defendant supplied the plaintiff with a proper answer, supported by such proofs as would furnish the latter with a reasonable ground to believe the facts stated in the answer to be true, he was bound by the spirit of his contract to have accepted and filed it, or put in an answer containing in substance the same defence. - - - - - *Ib.*
 4. Whether such answer was furnished, and such proofs given as would lay a reasonable ground for the plaintiff's believing the defence set up by the defendant, was a question of fact for the jury, to be determined by an exhibition of the answer and proofs in support of it, as communicated to the plaintiff. *Ib.*
 5. If the plaintiff in his conscience could not put in the answer furnished him by the defendant, good faith on his part demanded that he should have pointed out his objections and difficulties to the defendant. - *Ib.*
 6. The law sometimes implies contracts, but never when there is an express contract, or facts exist wholly inconsistent with the contract to be implied. *Stockett vs. Watkins' Adm'rs*, - - - - - 326
 7. K, whose vessel had been, with others, sunk in the harbor of B, in 1814, for its protection from the public enemy, in February, 1821, wrote to C, that "it would be a source of gratification to me, if your exertions are crowned with that success they so justly merit, and I rest assured, that you will interest yourself equally as much for the T's (the name of K's vessel) business, as that of the other vessels entrusted to your management." C attended to the claim of the owners of the sunken vessels upon the government for indemnity; and on the 5th March, 1823, K enclosed him an order, (without date) on the Secretary of the Treasury, requesting him "to pay C, out of the allowance for K's claim, which had been retained at the Treasury on K's account, a certain sum, being C's proportion of said retained money, as stipulated to be paid him for his services and expenses in collecting the proofs relating to the application of the said vessel to the public defence." It appeared that in 1817, K had been discharged from his contracts under the insolvent laws of Maryland, and in December, 1821, his trustee agreed to allow C a commission for prosecuting the claim of indemnity for K's vessel, in the event of his succeeding, provided the Court would permit the trustee so to do. The whole allowance was, however, retained by the government, and passed to the credit of K's bonds, for duties then unpaid. In an action by C against K, to recover compensation for his services aforesaid: HELD, there was evidence for the jury to find a contract between C and K, and they might as fairly infer that it was entered into a little anterior to the letter of 1821, as before the insolvency of 1817—and that if the plaintiff was to be paid out of the sum to be allowed on account of the vessels, yet if he had been deprived of it by the defendant's means, the defendant was personally liable—that the United States under the circumstances being authorised to retain the allowance in payment of the defendant's bonds, their claim being a just one, and the plaintiff having no lien on the fund in the Treasury, the defendant still remained liable. *Kalkman vs. Causten*, - - - - - 357

8. The plaintiff and defendant being joint owners of a line of stages, agreed as follows: "I (the defendant) hereby acknowledge to have received of D, (the plaintiff) stage proprietor on the W. and B. road, \$9000, as a full compensation for the within named four teams, and two coaches, and I bind myself to withdraw all my pretensions to any part of said road; and I herewith deliver to the said D. the teams as they are at this instant, on the road between this place, (B.) and W.; and further pledge myself not to be concerned, *direct or indirect*, in any line of stages in opposition to him." HELD, that in construing this contract, the Court must endeavor to arrive at the meaning of the parties, by looking to the motives that led to it, and the object intended to be effected by it. The motive was to become sole proprietor of all the stages on that road, and to shut out all opposition. To effect that object, the purchase of the defendant's interest in the stages was made. *Davis, et al. vs. Burney*, - - - - - 382
9. The intention of the contract was, that the defendant should, in good faith, not only *not* become *interested* in any opposition, but that he would *not* in any manner aid or become instrumental in the setting up, or carrying on an opposition line. *Ib.*
10. The word "*indirect*" was used for the special purpose of guarding against any kind of interference by the defendant, in aiding, or in any manner promoting the establishment of, or carrying on, any opposition. - - - - - *Ib.*
11. A line of stages being established in opposition to the plaintiff's line, the Court held, that if the defendant furnished its owners with money, credit, or other means, for the purpose of enabling them to carry it on, and that the means so furnished did enable them to establish and carry it on, and that they could not have established or carried it on without such means, or that the defendant did furnish them with money, credit, horses, or any other means, for the purpose of enabling them the *better* to establish or carry it on, and that such means did so enable them, then the plaintiff was entitled to recover damages for a breach of the said contract. *Ib.*
- See Court of Chancery, 7, 8.

See Evidence, 1.

— Promissory Note, 1, 3, 4, 5, 6, 7.

— Ships and Shipping.

CONVEYANCE.

1. To give a deed legal effect and operation, as a deed under a decree of the Court of Chancery, a copy of the record ought to be produced, to show the trust reposed in the grantor, and his legal performance of it. *Shilknecht, et al. Lessee vs. Eastburn's Heirs*, - - - - - 114
2. Although a deed cannot have legal operation as a deed under a decree of Chancery, without producing the record, yet it shall be taken most strongly against the grantor; and such legal interest as he had, capable of being transferred, may pass thereby. - - - - - *Ib.*
3. The proprietor of adjacent tracts of land, conveyed the younger tract by metes and bounds; all the land contained within those metes and bounds, passes to the grantee, although part of the elder tract is embraced in them. *Mundell vs. Perry*, - - - - - 193
4. G and T were seized in fee, as tenants in common, of a tract of land called the *Valley of Owen*. T contracted with G for the purchase of his moiety, and paid the purchase money, upon which G executed and delivered to T, a deed for "all that one equal undivided half part of a tract of land called the *Valley of Owen*, which was sold by G to T (and which at the instance of the said T to secure the payment of the purchase money to M, G had conveyed to M by the name of *Glen Owen*, and the said purchase money being fully paid to M, the said M by deed, has this day conveyed to said T) together with all the advantages and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title and interest whatsoever, at law and in equity of the said G, of, in, and to the same." This deed also contained a covenant for further assurance. T filed his bill for further assurance, alleging that his deed did not convey to him a clear and undisputed title to the tract called the *Valley of Owen*, with all the advantages incident thereto, and as the same might be enjoyed under the original patent thereof. HELD, that this was a valid deed to pass to complainant

all the right of G to a moiety of the tract of land called *Valley of Owen*. *Gwynn vs. Thomas*, - 420
 See Ejectment, 3.
 — Evidence, 11, 12.

CORPORATION.

1. A Corporation may employ one of its members as an agent; and there is no incompetency in such member to be an agent for a purchaser, and make the memorandum required by the statute of frauds, at a sale of the property of such a Corporation made by such member as its agent. *Stoddert vs. The Vestry of P. T. Parish*, - - - - - 227
2. In an action by a Vestry to recover the price of a pew sold under its authority, the plaintiff need not produce evidence of title. - *Ib.*
 See Evidence, 7.

COURTS.

See Records, 1.

COURT OF CHANCERY.

1. *A feme covert*, in consideration of a creditor of her husband giving him further time to pay his debt, executed a deed jointly with her husband, in form a mortgage, of real estate, to secure its payment. This deed was not acknowledged according to the Acts of Assembly in relation to conveyances of land by *feme covert* grantors, nor did it purport to be in execution of a power reserved to her, but being for property, in fact held in trust for her separate use, which she had a right to convey as a *feme sole*, was considered in equity as creating a specific lien, and enforced accordingly. *Brundige vs. Poor*, - 1
2. The real estate of an intestate was adjudged incapable of division, and elected to be taken at the appraisement per acre, under the act of descents, by one of the heirs, who gave his bonds accordingly, conditioned to pay the co-heirs their several proportions of the appraised value of the land. Such heir, who was also the administrator, in consideration of retaining the amount of the intestate's debts to be paid by him, out of the proceeds of the real estate, delivered over the intestate's personal property to his co-heirs. It was afterwards discovered, that the land fell short of

the estimated quantity, on which the appraisement was founded. In this case, a bill in equity, in which all the co-heirs were made defendants, was held to be a proper mode of obtaining relief, as well to rectify the error in the estimate of the land, as to obtain credit for the debts paid; which payments, if they exceeded the proceeds of the land, might, as essential to full relief, be recovered back. *Gibbs vs. Clagett*, 14

3. Upon the establishment of such a case, it is the duty of the Chancellor to direct the auditor to state an account between the parties; and the order to the auditor should invest him, with the usual authority of taking testimony upon the subject matter of the account. - *Ib.*
4. The objection that a bill is multifarious, should be raised by a demurrer, before answer; filing an answer, and going into an examination of testimony, as to the merits of the whole matter in controversy, is a waiver of that objection.

Ib.

5. If a bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief. *Ib.*
6. D, by last will, devised as follows: "Item. I give and bequeath to my two grandsons, S and W, sixty dollars each; and all the rest and residue of my personal estate, I give to be equally divided among my five sons." He also devised his real estate to his widow, and after her death, or marriage, directed his executors to sell it, and divide the proceeds among his sons. The testator's personal estate being insufficient to pay his debts, and also the pecuniary legacies, one of the grandsons, after the widow's death, filed a bill to have the land sold for the payment of his legacy. *Held*, That he was not entitled to relief. *Simmons vs. Drury*, - - - 32
7. T, who was indebted to A and H, held a mortgage from W, upon which he made the following assignment, under his hand and seal. "For value received, I hereby transfer, assign and make over to Messrs. A and H, this mortgage and the debt so intended to be secured thereby, witness my hand and seal, this, &c." About twelve months after, T died. The mort-

- gage and assignment were found uncanceled among his papers. To a bill filed by A and H, against the mortgagor and T's administrator, to enforce the assignment for the payment of their debt, which alleged, that T had promised to secure their debt by making the assignment in question, the answer of the administrator stated, "that T might have promised to secure the debt, and that the endorsement may have been written on the mortgage with a view to comply with such promise, but denied that there was a delivery of it in fact by T, or an acceptance thereof by the complainants." Upon an appeal, it was HELD, that an assignment of T's interest in the mortgage, might be good and operative, without actual delivery, if connected with evidence to show he intended it to transfer his interest, in the thing assigned. That this assignment had all the forms and solemnities necessary to constitute a good contract, was in his hand-writing, signed by him, and contained a full expression of his intention to transfer his interest in the mortgage. *Aldridge and Higdon vs. Wiems and Hall*, - - - - - 36
8. A Court of Equity has the power, and will make every possible effort, within the range allowed by the statute of frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law. - - - - *Ib.*
9. The answer of an executor or administrator in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule, that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one with pregnant circumstances. *Pennington vs. Gittings*, - - - - - 208
10. When an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. *Ib.*
11. The gift by a father to his child of a certificate, that the father is entitled to a certain number of Shares in the Capital Stock in a Bank "transferable at the said Bank only, personally, or by Attorney," signed by the Cashier of the Bank, and endorsed in blank by the father, will not sustain a bill in equity by the donee against the executor of the donor, praying for a transfer of the stock mentioned in the certificate. - - - - - *Ib.*
12. A gift, which is not good and valid at law, cannot be sustained in equity. - - - - - *Ib.*
13. It is a settled principle that Chancery follows the law; and acting in obedience to the statute of limitations, the plea thereof is as available at equity as at law, in relation to the same subject matter. *Watkins vs. Harwood*, . - - - - 307
14. It is a well settled principle, that the Court of Chancery will not order a receiver to pay over, or account for the rents and profits to a party, when the land is not charged with the payment of his claim. *Mayor and City Council of Balt. vs. Chase*, - - - - - 376
15. Rents and profits are recoverable in equity from those who take possession of a minor's real estate. *Wells vs. Beall*, - - - - - 458
16. The Court of Chancery has jurisdiction to decree dower, and rents and profits, to the widow, from the death of her husband. *Wells, et ux. vs. O. Beall, et ux.* - - - - - 468
17. Where dower is claimed at common law, and the husband's title to the land is controverted, it must be made out at law; but it will not therefore follow, that a bill in Chancery for its recovery is to be dismissed, because the right to dower is denied. The Chancellor should in such case retain the bill for a reasonable time, until the right at law is established. - *Ib.*
18. The statute of limitations is no bar in equity to a widow's claim for dower, or the rents and profits thereof. *PER BLAND, CHAN'R.* *Ib.*
- See Conveyance*, 1, 2, 4.
— *Mortgage*, 1, 2, 3.

See Practice in Chancery.
— Presumption, 4.

COVENANT.

See Ships and Shipping.

CRIMINAL LAW.

See Indictment, 1, 2.

DAMAGES.

See Bonds, 2, 3, 4, 5.
— Executor and Administrator, 6, 8, 11.
— Evidence, 20.
— Trespass.
— Trover.

DEED.

See Conveyance, 1, 2, 4.
— Evidence, 11, 12.

DELIVERY.

Not essential to assignment of a mortgage in all cases. *Vide* Court of Chancery, 7.

DEPOSITIONS.

See Evidence, 2, 3.

DISTRIBUTE AND DISTRIBUTION.

See Action, right of, 1.
— Executor and Admr, 1.

DONATIO MORTIS CAUSA.

See Court of Chancery, 11.
— Gift, 1, 2, 3.

DONATIO INTER VIVOS.

See Court of Chancery, 11.
— Gift, 1, 2, 3.

DOWER.

1. M purchased a tract of land, which at his request was conveyed to his son C. At this time C was a minor, and did not attain his majority until after his father's death. M bequeathed pecuniary legacies to his son H, and other children, except C. After M's death, the children entered into a parol agreement to divide equally the real and personal estate of their father, and in pursuance thereof, C conveyed this land to H, then a married man, in fee, who gave bonds to the children for, and executed a mortgage of the land to them to secure the payment of, their several shares of their father's estate. The deed, mortgage and bond were all executed at the same time. Upon H's death, it being ascertained that the land was insufficient to pay the mortgagees, if subject to a claim of dower in favor of H's widow. *Held*, That she was not entitled to dower. *McCaulley vs. Grimes*, 318

2. There is no general rule, in strictness, that in cases of instantaneous seisin, the widow shall, or shall not, be entitled to dower. This must depend as well upon the character of the seisin, as its duration. - *Ib.*
 3. Where a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed. - - - *Ib.*
 4. Where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed. - - - *Ib.*
 5. Where one is seised for the combined use of himself and others, and his interest, real or contingent, is not susceptible of any particular ascertainment, but is necessarily undefined, and is to be postponed until the gratification of all the uses to which his seisin is subservient, it is not a case of beneficial seisin for his own use, so as to endow his wife to the prejudice of the other uses. - - - *Ib.*
 6. The Court of Chancery has jurisdiction to decree dower, and rents and profits, to the widow from the death of her husband. *Wells, et ux vs. O. Beall*, - - - 463
 7. Where dower is claimed at Common law, and the husband's title to the land is controverted, it must be made out at law; but it will not therefore follow that a bill in Chancery for its recovery is to be dismissed because the right to dower is denied. The Chancellor should in such case retain the bill for a reasonable time, until the right at law is established. - - - *Ib.*
- See Limitation of Actions, 10.

EJECTMENT.

1. Where boundaries called for in a grant can be established, it is a settled principle of construction, that the courses and distances expressed, are to be disregarded, and the lines run to the boundaries, according to the calls. *Rogers vs. Raborg and Redding*, - - - 54

2. The patent for a tract of land described it as follows: "lying in the county aforesaid, on the head of the N. W. branch of P. river, and joining the S. W. side of B. town, and on a tract of land called L, beginning at a bounded red oak tree, standing near a bounded locust post, which post is the beginning boundary of B. town, and running thence, &c." the different lines by course and distance, without calls. HELD, that upon the true construction of this patent, neither the first, nor any other line of the tract granted by it, has a call to the first, or any other line of the tract called L, and that the word "joining," as there used, is not of such imperative and binding force, as that the said tract must be so located as to join L, but that the beginning tree being ascertained, the location of the land from that tree, must be governed by the particular description given in this case, by courses and distances, they having no calls or binding expressions to control them. - - *Ib.*
 3. In 1752, a patent was granted for a tract of land called P, containing 50 acres. In 1754, another patent was granted for a tract called *Resurvey of P.* containing 375 acres. They were issued to the same grantee; and in 1791, his heirs conveyed a tract called P, containing 375 acres, to certain persons, their heirs and assigns in trust. In an action of ejectment for a tract of land called the *Resurvey of P.*, the lessor of the plaintiffs claimed title from the surviving trustee, under a deed for a part of the last mentioned tract, which described the part conveyed by metes and bounds, and professed to be executed in pursuance of a decree in Chancery. No decree was produced, nor any evidence that the aforesaid tracts of land were the same in fact, but called by different names. HELD, That the deed of 1791 could only convey to its grantees, the trustees, the tract P, according to its original lines, metes, and bounds, and that they could transfer no title to the land claimed in this action. *Shilkecht vs. Eastburn*, - - - - 114
 4. A location of a tract of land by one party in Ejectment, not counterlocated by the other, is admitted to be correct; that is, that the land is correctly described on the plots; but it does not admit the title to the land. - - - - - *Ib.*
 5. To recover in Ejectment, when defence is taken on warrant, the plaintiff must shew the true position of the land by location, and also that he has a legal right to the land thus located. - - - - - *Ib.*
 6. The law is well established, that facts to aid a title may, in some cases, be presumed. - - - *Ib.*
 7. It is a case of constant occurrence, where a grantor having a right of entry on land conveys it to another, and therewith necessarily the power to maintain ejectment for it. *Gwynn vs. Jones*, - - - - 173
 8. Where it does not appear, either from the plots themselves, or the surveyor's explanations, what was the object or design of certain lines upon plots returned under a warrant of resurvey, nor from the surveyor's certificate, that he had ever made such locations, it is not competent to shew that the surveyor laid down such lines for a counterlocation of a tract of land described in the plots; for such lines are a mere nullity. *Mundell vs. Perry*, 193
 9. If testimony, out of the plots and explanations filed with them, could be received, to give name and character to unintelligible locations, it would defeat the object for which plots have been received as part of the pleadings in the cause. - *Ib.*
 10. The object and intention of introducing plots in the cause, is to give certainty to the claim and defence, and to apprise the parties, that the locations of other lands are to be used, to illustrate, and support, the location of those under which they claim title. It is to prevent surprise, and therefore it has been the uniform practice of the Courts, to reject evidence as to any object, unless it is located on the plots. - - - - - *Ib.*
- See Conveyance, 3.
 — Evidence, 2, 3, 4.
 — Limitation of Actions, 3, 4.
 — Presumption, 3, 4.
- ELECTION OF ACTIONS.
- See Assumpsit, 2.
- ENTRY—RIGHT OF.
- See Assignment, 2.
 — Limitation of Actions, 3, 4.

ESTATES UPON CONDITION.

See Assignment, 1, 2.

— Limitation of Actions, 3, 4.

ESTATE—TAIL.

A devise to "A and the heirs of his body, lawfully begotten," since the act of 1786, constitutes an estate in fee simple. A remainder limited to take effect upon the determination of such an estate is inoperative. *Wells vs. Beall*, - 458

EVIDENCE.

1. Several persons who had claims on the government of the United States, for injury done to their property, taken and used to prevent the approach of an enemy, employed an agent to collect their evidence, and prosecute their demands; but, before the matter was finally adjusted, one of them died. After this, the representative of the deceased, the defendant, attended several meetings of the persons interested in the said claims, at which it was always stated, that the plaintiff was acting as the agent of the owners of the property taken, in prosecuting their claim. The defendant also gave the plaintiff a letter of introduction, in which he was mentioned as the "representative of the unfortunate owners" of the property, for which indemnity was sought; and the person to whom it was addressed, was requested to aid the plaintiff in obtaining redress. One of the witnesses also proved, that in frequent conversations with the defendant, he, the witness, had stated that twenty per cent. was the commission stipulated to be paid by the owners of the aforesaid property; and that the defendant never objected to the same. The plaintiff attended to the agency until the passage of a law, under which the defendant was paid, as executor. In an action by the agent for the recovery of compensation for his services: HELD, that it was properly left to the jury to determine whether there was any *new* contract between the plaintiff and defendant, after the death of the original owner, by which the defendant would be liable in his individual capacity. *Stiles vs. Causten*, - - - 49
2. It is a settled rule of evidence, that if a person who has been re-

gularly sworn and examined on the ground, upon a survey executed in an action of ejectment, dies before the cause is tried, or leaves the State, and goes to parts unknown and without the reach of the process of the State, so that his attendance as a witness cannot be procured, his deposition so taken, and returned with the plots, may be read in evidence at the trial from necessity. *Rogers vs. Raborg and Redding*, - - - - - 54

3. So the deposition of a witness sworn and examined under the same circumstances, and who had become paralytic since his examination, and though regularly summoned, was unable to leave his house, or to speak so as to be understood, may also be read in evidence at the trial, for the same reason. - *Ib.*
4. Locations made by a lessor of the plaintiff in an action of ejectment, as, and for his claim and pretensions to a tract of land, being transferred to the plots in another action of ejectment, brought against those claiming under the lessor in the first action, and who took defence for the same tract in the second action, are competent, though not conclusive evidence for the plaintiff in the second action, to shew the true location of such tract, although the first action was dismissed. - - - - - *Ib.*
5. An inventory made and returned by an administrator to the Orphans Court, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the cause; for he might become personally liable for the costs of the suit. *Allender vs. Riston*, 86
6. The sheriff's schedule of goods returned, as taken and delivered in an action of replevin at the suit of R, may be read in evidence by the plaintiff, (who was one of the defendants in the replevin,) in an action against R, for the purpose of proving that R was in possession of the same goods, on the day after they were first taken. - - - *Ib.*
7. In an action against a corporation, the affidavit of the president thereof made for the purpose of procuring a continuance, in another cause than that in which it was offered as evidence, is not competent testimony.

- ny against such corporation, though the subject matter of the affidavit be pertinent to the issue. He should be sworn as a witness, the defendant being entitled to a cross examination. *Kemp vs. Balt. Fire Insurance Company*, - - - - - 103
8. An insolvent debtor who has obtained his final discharge, and released to his trustee all his interest in the property in dispute, and residue of his estate after paying his debts, is a competent witness in an action in which his trustee is plaintiff, to prove, that at the time a certain deed was executed by such witness and his partner to the defendant, who was their creditor, they contemplated becoming insolvent debtors, and apprised the defendant of such intention, who advised them to make such deed, and then apply for the benefit of the insolvent laws, and promised to aid them thereafter, though the effect of such testimony would be to avoid his deed, under our insolvent system. *Glenn vs. Von Kapff*, 132
9. It is competent to offer evidence in an action on a policy of insurance, whether according to the custom and usage of Insurance Companies, the word cargo in an order for insurance, would be considered as covering live stock. *Allegre vs. Maryland Insurance Company*, - - - - - 136
10. Where actions upon two policies of insurance for the same voyage, one upon the cargo, the other upon the vessel, were tried before the same jury at one time, proof that the word cargo, in the one policy, did not, according to the mercantile interpretation and usage of the place where the policies were effected, cover a shipment of mules, is not evidence that the other policy on the vessel is a nullity. A perilous cargo to the insurer does not necessarily increase the perils of the ship owner. *Chesapeake Insurance Com. vs. Allegre's Ad'rs*, 164
11. By the act of 1766, ch. 14, sec. 2, conveyances to pass an estate in lands for above 7 years, are required to be enrolled within six months from their date. The enrolling officer is directed immediately, upon the receipt of any such deed, to endorse thereon the time of his receiving it—to enrol it, and, “on the back of every such deed, in a full, legible hand, make a certificate of such enrolment, and the time of making it.” An original deed of that character, cannot be read as evidence of title, without offering proof of the hand-writing of the officer who endorsed it. *Gwynn vs. Jones*, - - - - - 173
12. A deed of land executed in the year 1735, to be competent evidence, should appear to have been recorded, according to the provisions of the act of 1715. *Mundell vs. Perry*, - - - - - 193
13. In an action by a Vestry of a Church, (a corporation) to recover the price of a pew, it appeared by the evidence of one of the members of the Vestry, that he had acted as auctioneer in the sale of the pews, and had put down in pencil, at the time of the sale, on paper, the name of the purchaser, the defendant, and the price at which a pew was bid off. This memorandum was delivered to the Register of the Vestry, who transcribed it in the record book of their proceedings, returned it to the witness, who had made diligent but unsuccessful search for it, and believed it was lost: HELD, that parol evidence of the price of the pew, and that it was sold on a credit of twelve months, bearing interest from the time of sale, as it would have established a different contract from that contained in the memorandum, was not competent to go to the jury. *Stoddert vs. Vestry of Port Tobacco Parish*, - - - - - 227
14. Evidence which leaves the mind in doubt, whether by a further search, certain record books sought for, might not have been regained, is not sufficient to let in parol evidence of their contents. *State vs. Wayman*, - - - - - 255
15. Where it was the duty of the Register in Chancery to make and keep records of the proceedings of his Court, his report to the Chancellor that he had made such records, and the statement of the Chancellor on the minutes of the Court, that such records had been made up, do not constitute primary evidence to shew that such records were made, and in the absence of

satisfactory proof of the loss of the record books themselves, are not admissible as secondary evidence of the same fact, nor is the estimate of a subsequent Register, made by the direction of the Legislature, of the sum it would require to furnish a substitute for such record books, nor his evidence that that the same had been all correctly made up, admissible under such circumstances. - - - - - *Ib.*

16. A was Adm'r *d. b. n.* of S, and Ex'r of L, the widow of S. In an action brought against him for the use and occupation of land, and hire of negroes, it appeared that the plaintiff had a deed for certain land and negroes from S, who retained possession until his death, when his widow, who was his sole devisee and executrix, continued that possession, and shortly after filed her bill in Chancery to have the plaintiff's deed, which was absolute in terms, decreed a mortgage; before that cause was decided the widow also died. The defendant, as her Ext'r. and as Ad. *d. b. n.* of S, and in conjunction with her devisee of the land, filed a bill of revivor, and after much litigation, the plaintiff's deed was sustained. The defendant had, in fact, entered upon and rented out the land, and used the negroes conveyed to the plaintiff, after the widow's death, and had frequently said, if the bill was decided in favor of the plaintiff, the rent of the land, and the hire of the negroes, would be payable to him. Upon the decision of the cause, the land and negroes were delivered up to the plaintiff, and the accruing rent of that year paid to him by the tenants. It did not appear under what circumstances the defendant had originally entered into the land. HELD, that the widow's admissions, that she held the land and negroes as the plaintiff's tenant, and by his permission, were not competent evidence to charge the defendant; that the evidence was not sufficient to warrant the inference, that the relation of landlord and tenant subsisted between the plaintiff and defendant, the facts and circumstances not being such as usually attended a permissive holding; but that

he was responsible for the hire of the negroes, during the time he had them. *Stockett vs. Watkins' Administrators*, - - - - - 326

17. When there is any legal admissible evidence, tending to prove the issue in a cause, the effect of that evidence is solely for the consideration of the Jury. *Davis vs. Barney*, - - - - - 382

18. When there is no evidence applicable to the issue, or tending to prove any material fact, there is a total failure of evidence, the Court will direct the Jury accordingly. *Ib.*

19. A proved a settlement with C on the 1st March, 1820, shewing a balance due him of \$1013, for building certain houses. C, under a notice of set-off, established payments to the amount of \$195; and to shew that A had no separate right of action, proved that he was a partner in two firms, one of which furnished the bricks, and the other did the brick work of the houses, and both of which rendered accounts in 1818 and 19, amounting to \$2350, for their respective claims. He also proved various receipts, during the same years, of the individual partners of those firms for payments made to them—some on account of such buildings generally—some for bricks,—some for brick work, amounting in the whole to \$1310. A then offered to prove by one of his former partners, that his firm was dissolved about the close of 1819, and its debts assigned to A. The county court admitted the witness, and held that the settlement in 1820, was evidence of C's knowledge of the dissolution of that firm, and the transfer of its debts to A; but no evidence of the dissolution of the other firm being given, that court also decided that the whole evidence did not furnish competent proof of any balance being due to A individually. Upon appeal, held that this was a question of fact for the jury. *Barger vs. Collins*, 410.

20. In an action upon an appeal bond, entered into by a defendant in replevin, against whom there was a final judgment for a return of the property replevied, it was held on an inquiry of damages, that the plaintiff might give in evidence the

value of the goods replevied; the record of the replevin was proper evidence to identify them, and the appraisal made in such cases was *prima facie* evidence of their value. That the plaintiff's right to recover interest on the value of the goods replevied and costs of the replevin, was a question exclusively for the jury, and that the bills of exceptions taken and signed in the action of replevin, could not be read to the jury to show that interest ought not to be allowed. That the record of the judgment against B the surety, and the execution thereupon issued, returned "*cepi*," "staid by injunction," is not evidence to show that the plaintiff had been satisfied that judgment, or that the amount thereof ought to be allowed by the jury in the assessment of damages. *Karthus vs. Owings*, - - - - - 430

21. The appraisers authorised in the case of rent by the *Statute Geo. 2*, have in practice been resorted to in all cases of replevin in this State, for the purpose of ascertaining the value of the goods replevied; their appraisal is *prima facie* evidence of the value of goods taken. *Ib.*

22. In an action by L upon a single bill payable to him as executor of B, evidence of the consideration cannot be given to exculde a set-off claimed by the defendant from L. *Turner vs. Plowden*, - - - 455

See Contract, 7.

— Executor and Administrator, 5.

— Ejectment, 4, 8, 9, 10.

— Insolvent Debtor, 1, 2, 3.

— Insurance, 3, 7.

— Limitation of Actions, 1, 2.

— Promissory note, 2, 8.

— Practice, 1, 2.

— Surety.

— Trover.

EXECUTION.

See Practice, 5.

— Insolvent Debtor, 6.

EXECUTORS AND ADMINISTRATORS.

1. W died in 1814, intestate, as to his personal estate. Administration was granted to his widow, who returned an inventory, and in 1816 settled an account with the Orphans' Court, in which she obtained credit for various payments.

She, with several, but not all, of the deceased's children, in 1822 united in a mortgage to the defendant, of some of the personal property which the intestate left, to secure the payment of a debt, for which the mortgagors were responsible to the defendant. The mortgage did not profess to be executed by the widow, in her representative character; and it did not appear that any of the intestate's debts remained unpaid. The widow died, and in 1823 the plaintiff was appointed administrator *d. b. n.* of W, and brought replevin against the defendant, who claimed the goods under his mortgage. **HELD**, That inasmuch as strong circumstances existed in the case, to induce the presumption that the intestate's debts had been all satisfied, it was fair to infer that the administratrix had made distribution of the remaining assets, and acted in her character of distributee, in making the mortgage; that therefore the plaintiff was not entitled to recover. *Allender vs. Riston*, - - 86

2. I and P, were joint executors of W, who left a son, for whom I was also appointed guardian. In an action brought by the administrator of that son on the guardian's bond, against one of I's sureties, it appeared that many years before the commencement of the suit, the joint executors had received a considerable amount of assets, but had not settled any account with the Orphans' Court, and that P was dead: **HELD**, that I's guardianship ceased with the death of his ward, and as it did not appear that he died after P, and after I became sole executor, the action could not be sustained. *Watkins vs. State*, 220

3. Where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands, to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the Orphans Court, or not. *Ib.*

4. But where there is a joint executorship, this construction of law cannot consistently with principle prevail: because his co-executor is entitled to the possession of the

- assets equally with the guardian, and the property of his ward cannot be legally considered in his hands, until he has actually received it. - - - - - *Ib.*
5. Confession of judgment by an executor is conclusive against him, but only *prima facie* evidence against his surety. *Iglehart vs. State*, 235
6. G, as administrator of A, took possession of various articles of personal property left by her, part of which she held as executrix of H, and sold them. Some years after this, letters of administration *d. b. n.* upon H's estate were granted to S, who brought *trover* against G, for that part of the property which had originally belonged to H. **HELD**, that although S was present at such sale and purchased some of the articles, yet he was not precluded thereby from recovering from G for this conversion. *Glenn vs. Smith*, 493
7. Letters testamentary or of administration granted in another State, give no authority to sue, or to administer assets in this State; and will not exempt a party from liability, in an action by the rightful administrator here, though distribution be made in conformity to such letters. - - - - - *Ib.*
8. H died indebted to I, leaving A his executrix, who came into the possession of assets, and paid I the notes mentioned in the following receipt, written at the foot of his account: "Received of A, executrix of H, two promissory notes signed by herself, and endorsed by G & Co. in payment of the above account." Before these notes arrived at maturity, A died, and G, her executor, took possession of her estate and sold it, and paid the notes in question. Letters *d. b. n.* upon the estate of H were granted to S, who sued G in *trover* for the value of property which belonged to H, but which G had sold as executor of A. **HELD**, that the acceptance by I of the notes in question, was not an extinguishment of the debt due him by H; that the payment by G, was, therefore, the payment of H's debt, and entitled him to deduct that payment from the proceeds of H's personal property sold by him. - - - - - *Ib.*
9. There are acts of intermeddling, such as locking up the goods of a deceased person for safe keeping, which will not charge a man as executor of his own wrong. - *Ib.*
10. The taking the goods of an intestate by a stranger, and using or selling them, and in general any intermeddling with them, will, as respects creditors, make him an executor *de son tort*, and chargeable with the debts of the deceased, so far as assets come to his hands. *Ib.*
11. As against creditors an executor *de son tort* is justified in paying the debts of the deceased; and if sued by such he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot in any case, retain any part of the goods of the deceased in satisfaction of his own debt. - - - *Ib.*
- See* Abatement, 1, 2.
 — Action, right of, 1, 4.
 — Bonds, 6.
 — Evidence, 1.
 — Limitation of Actions, 9.
 — Pecuniary Legacies and Legatees, 1, 2, 3.
 — Trover.
- EXECUTOR** *de son tort*.
See Ex'r and Adm'r, 9, 10, 11.
 — Trover.
- EXECUTORY CONTRACT.**
See Consideration, 1.
- EXTINGUISHMENT OF DEBTS.**
See Executor and administrator, 8.
 — Promissory Note, 10, 11, 12, 13, 14.
 — Pecuniary Legacies, 1, 2, 3.
- FACT.**
See Evidence, 19.
 — Presumption, 1.
 — Practice, 1, 2, 3, 4.
- FEE SIMPLE.**
 A devise of an estate to A and the heirs of his body lawfully begotten since the act of 1786, ch. 45, constitutes a fee. *Wells vs. Beall*, 458
- FEME COVERT.**
 Power of, over separate estate. *See* Court of Chancery, 1.
 When her real becomes personal estate, *See* Husband and Wife.

FIERI FACIAS.

Return day extended, *vide* Practice, 5.

FOREIGN LAWS.

See Executor and Administrator, 7.

GIFT.

1. Neither a *donatio inter vivos*, nor a *donatio mortis causa*, can be by mere parol. The rule of law in either case is, that a delivery of the thing intended to be given, is essential to the perfection of the gift. *Pennington vs. Gittings*, - - - 208
 2. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor, with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiae*, (which must be the case, where he retains the possession, and what is done, is merely by parol,) there cannot be a perfect and legal donation. - - - - - *Ib.*
 3. A gift which is not good and valid at law, cannot be made good in equity. - - - - - *Ib.*
- See Court of Chancery, 11.

GUARANTY.

L upon an award in his favor, wrote the following order: "M will please pay D, or order, the above award of \$289, with interest, which sum I guarantee to said D for value received, this 10th September, 1822. L." In October, 1822, D presented the order to M, which was not paid. In August, 1824, he obtained judgment upon the award against M, who at that time was, and ever since has been, insolvent. In November, 1823, D informed L of M's failure, and required payment of L, which was refused. In June, 1824, D sued L. **HELD**, that he could not recover.
PER FREDERICK COUNTY COURT.
Davis vs. Leab, - - - - - 302

See Contract, 2.
— Indemnity.

GUARDIAN AND WARD.

See Court of Chancery, 15.

— Executor and Administrator, 2, 3, 4.

HUSBAND AND WIFE.

Upon a petition by several heirs-at-law, certain real estate in which they were jointly interested, and which was not susceptible of a beneficial division among them, was decreed to be sold. A trustee was appointed; the land sold; and a report of the trustee, stating the proceeds of sale to be in his hands, was ratified and confirmed by the Court. Before the auditor had distributed these proceeds among the heirs, one of them, who was a married woman, died. **HELD**, That her surviving husband was entitled to her distributive share of the sale.
Hammond vs. Stier, - - - 81

INDEMNITY.

See Contract, 2, 3, 4, 5.
— Guaranty.
— Practice, 5.

INDICTMENT.

1. In an indictment under the Act of Assembly, 1826, ch. 251, the lottery ticket or part of a ticket should be set out—the sale of only such tickets, as are not authorised by the State, is prohibited, and it would be proper that the ticket should be set out, that the Court might see whether it were a ticket, the sale of which was authorised or prohibited. *State vs. Scribner and Barker*, - - - - - 246
2. In all cases of larceny, very particular descriptions of the goods taken have never been considered necessary, and the description given in the law which enacts the offence in statutable larcenies, has in general been deemed sufficient—this doctrine is founded partly on the fact that the prosecutor is not considered as in the possession of the article stolen, and is not therefore enabled to give a minute description; and principally because notwithstanding the general description, it is made certain to the Court from the face of the indictment, that a crime has been committed, if the facts be true. *Ib.*

INSOLVENT DEBTOR.

1. In a suit by a trustee of an insolvent debtor, claiming in his character of trustee, a general issue plea does not admit the character

- in which the plaintiff sues. *Winchester, Trustee of Williams vs. The Union Bank*, - - - - - 73
2. To establish the right of such a trustee, the plaintiff, under the general issue, must prove every thing essential to the showing himself clothed with the character and authority of a trustee, which cannot be done by the production of the certificate of the commissioners of insolvent debtors, and the final discharge of the insolvent only, but all the proceedings must be exhibited. - - - - - *Ib.*
 3. The different insolvent laws of this State constitute one general system and must be construed together; and so construed, require a bond with *security* to be given, before a trustee can act as such, without which, he cannot be invested with the character and rights of a trustee. To establish his character as trustee; and his right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given, by proof of the bond itself. - - - - - *Ib.*
 4. The trustee of an insolvent debtor derives his right from his appointment, and the insolvent laws requiring that he shall give bond with security, for the faithful performance of his duty, before he acts as such, until such bond is given, he is not invested with the functions of trustee, and can neither sue for, nor in any manner intermeddle with the property of the insolvent. *Winchester, Trustee of Gooding vs. The Union Bank*, 79
 5. So one appointed such trustee, having given bond after he brought suit, cannot maintain it. - - - *Ib.*
 6. A final release under the insolvent laws of this State, obtained by a debtor to the State, after judgment rendered against him, will protect him from a *ca. sa.* on such judgment; and if arrested, the Court will discharge him on motion.— *State vs. Walsh*, - - - - - 406
See Contract, 7.
— Evidence, 8.
- subject matter of insurance, but also of the parties by whom the insurance is effected. *Allegre vs. Maryland Insurance Company*, 136
2. So an application for insurance from *Rio de la Plata* to *Havana*, which stated "said vessel will sail from *La Plata*, in the course of this month," made by a merchant in *Baltimore*, to an insurance company there, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief, or opinion of the applicant, that she would sail at the time mentioned. - - - - - *Ib.*
 3. In an action on a policy of insurance, the question, whether the risk has been materially increased by the sailing of the vessel on her voyage, at one time, instead of another, ought not to be submitted to the jury, when no testimony whatever had been adduced on the subject, to warrant the jury in drawing such a conclusion. - - - - - *Ib.*
 4. It is competent to offer evidence, whether, according to the custom and usage of insurance companies, the word cargo, in an order for insurance, would be considered as covering live stock. - - - *Ib.*
 5. A policy on cargo, or goods and merchandize, will not cover articles which are stowed upon deck. *Ib.*
 6. The word cargo, in an order for insurance, does not, ordinarily, cover live stock; but if live stock constitute the only article of exportation from the port from which the vessel carrying the insured property is to sail, to the port to which she is destined; or if, according to the mercantile usage of the place of effecting the insurance, the word cargo is understood to cover live stock, then an insurance under that general denomination, will cover live stock. - - - *Ib.*
 7. The existence of such usage, when evidence is offered for and against it, it is a question exclusively for the jury. - - - - - *Ib.*
 8. Uniformity of decision among the several States of the Union, on questions connected with contracts of insurance, is of vast importance to the mercantile community; and that consideration alone, in the ab-

INSURANCE.

1. Orders for, and contracts of insurance are to be liberally construed, and with reference not only to the situation and circumstances of the

- sence of all motive or obligation to embrace a contrary doctrine, should induce the sanction of principles established in the other States. *Ib.*
9. A perilous cargo to the insurer, does not necessarily increase the perils of the ship owner. *Chesapeake Insurance Company vs. Allegre*, - - - - - 164
10. It is true, as a general rule, that in an order for insurance upon a vessel, it is not necessary to state the nature or condition of the cargo designed to be transported. If the underwriters desire information upon that subject, it is for them to ask it. - - - - - *Ib.*
11. In such case, the underwriter is presumed to be acquainted with the ship-owners rights. In the absence, therefore, of fraud, or evidence to vary the general rule, the payment of a loss under the policy, cannot be resisted upon the ground that a larger premium would have been required for the insurance of a vessel employed in transporting mules, than was stipulated to be paid under a contract which did not mention the nature of the cargo. - - - - - *Ib.*

INTEREST.

1. Interest, beyond the penalty, may be recovered in an action on a bond, given to secure the payment of a debt. It is given on account of the detention of the debt, and from the time its payment was demanded. The right to it, is considered an exception to the general rule, which limits a recovery on a bond to the penalty. *State vs. Wayman*, 254
2. The right to recover interest on the value of goods replevied, where the question arises in an action upon appeal bond, given by the plaintiff in replevin, who failed to prosecute either his action of replevin or appeal, with effect, is a question exclusively for the jury. *Karthauss vs. Owings*, - - - - - 430
- See Bonds, 2, 3.
— Evidence, 20.

INVENTORY.

See Evidence, 5.

JUDGMENT.

See Appeal, 2.
— Pleas and Pleading, 1, 2.
— Surety.

JUDICIAL SALES.

Every fair, legal presumption ought to be allowed in favor of a judicial sale, where the purchase money has been *bona fide* paid. *Shilknecht vs. Eastburn*, - - - 114

JURISDICTION.

See Action, right of, 1.
— Court of Chancery, 2, 8, 16, 17.
— Dower, 6, 7.

JURY AND JUROR.

See Contract, 4.
— Evidence, 19.
— Insurance, 3, 7.
— Presumption, 4.
— Practice, 1, 2, 3, 4.

LANDLORD AND TENANT.

See Evidence, 16.
— Use and Occupation, 1, 2.

LARCENY.

See Indictment, 2.

LEASE.

See Limitation of Actions, 3, 4.

LIEN.

See Court of Chancery, 1.

LIMITATION OF ACTIONS.

1. The acknowledgment of defendant, that the promissory note upon which he was sued as maker, was originally given to close an account, which the payee and plaintiff had against the vestry of a church, of which he, the defendant, was a member; and that the money arising from the pew rents was to have been applied to the payment of the same, but that it never had been paid, is not sufficient to take the case out of the statute of limitations. It shews that there never was an existing debt due from the defendant; and that when the note was given, it was not to be paid by him, but out of the money arising from the pew rents, which exempts him from any moral obligation to pay. *Rogers vs. Waters*, - - 64
2. Where a plaintiff gives in evidence a letter from the defendant, to avoid the Statute of Limitations, he must take the letter as it is. - *Ib.*
3. Mere continuance in a possession, which originated under a lease from the Lord Proprietary of this State, created in conformity to the act of

- 1704, ch. 16, sec. 5, after the reversioner is entitled to re-enter for a condition broken, and before the original term had expired by lapse of time, is not adverse to the reversioner's right to re-enter, nor will limitations begin to run under such circumstances. *Gwynn vs. Jones*, - - - - - 173
4. Where a possession commenced rightfully, and with the consent of the owner, nothing is to be presumed to make it adverse. Mere holding over, after the term ended, is not evidence of an adverse possession; and the possessor will be regarded as the tenant at will of the landlord, unless he can show that, since the expiration of the lease, he has held forcibly, or has acquired a title paramount to that under which possession was originally taken. - - - - - *Ib.*
5. In an action by the endorsee against the maker of a promissory note, negotiated before maturity, evidence that a few days before the institution of the suit, the witness spoke to the defendant on the subject of the note, when the defendant said he could not pay it, that the payee of the note had charged him too much, that some discount must be taken from the note, and that he must see the payee on the subject; that however, he would think of it, and if witness would call at his store in a few days, he would say more about it; that shortly after witness did call, when defendant said he was going to P, when he would see the payee, until then he could do nothing further, is a sufficient answer to the plea of limitations. *Keplinger vs. Griffith*, 296
6. W, in March, 1827, filed a bill against the administrators of H, who died in 1826, for an account and distribution of his personal estate. After the coming in of the answers, and the cause had been referred to the auditor, the administrators filed with the auditor, as a set off to W's claim for a distributive share, a mortgage, from her to the deceased of *personal* property to secure the payment of a debt, containing a covenant for its payment on or before the 1st January, 1810. HELD, that the plea of limitations was a bar to this mortgage. *Watkins vs. Harwood*, - - - 307
7. By the act of 1715, ch. 23, the Act of Limitations of this State, the recovery of a debt due by specialty is barred after a lapse of twelve years. - - - - - *Ib.*
8. It is a settled principle that Chancery follows the law; and acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the subject matter. - - - - - *Ib.*
9. The bond required from executors by the act of 1798, ch. 101. sub. ch. 14, sec. 6, is a testamentary bond within the meaning of the act of limitations, of 1729, ch. 24, sec. 21, and an action upon such bond not commenced within 12 years after the passing the same, will be barred by pleading the act of 1729 aforesaid. *State vs. Boyd*, - 365
10. The Statute of Limitations is no bar in equity to a widow's claim for dower, or the rents and profits thereof. *Per Bland, Chan'r*, 468

LOCATIONS.

See Ejectment, 1, 2, 4, 5, 8, 9, 10.
— Evidence, 4.

MAYOR AND CITY COUNCIL OF BALTIMORE.

1. C filed a bill in Chancery to recover dower in certain real property, upon which that Court appointed a receiver to receive the rents and profits pending the controversy. After this, *The Mayor and City Council of Baltimore*, filed their petition against the receiver, praying to be paid for taxes due on said property prior to the time of the receiver's appointment, out of the rents which had come to his hands. The petition did not aver that there was no personal property of the tenant in possession to be found sufficient to pay the taxes charged, nor was the tenant in possession at the time the taxes became due, who, by law, is chargeable with their payment, made a party. HELD, that they could not recover. *Mayor and City Council of Baltimore vs. Chase*, - - - - 376
2. In the collection of taxes imposed upon real estate within the city of Baltimore, for the year 1821, the ordinances of that city imposing

them, having referred to the Laws of the State, for the manner of collecting them, the land can never be sold for their payment, unless the Collector can find no personal property liable for the payment of the tax. If personal property can be found, it must be made liable in the first instance. - - - - *Ib.*

MORTGAGE.

1. A mortgage omitted to be recorded in due season from no fraudulent design, will, under the act of 1785, ch. 72, sec. 11, be decreed to be recorded, saving the rights of subsequent purchasers without notice of its existence; and upon a bill filed by the mortgagee, a sale of the mortgagor's interest at the time of its execution, will also be decreed with a like saving. *Sprigg vs. Lyles*, - - - - - 446
2. A mortgagee solicited a third party to purchase land, mentioned in his unrecorded mortgage, at sheriff's sale, under a judgment against the mortgagor, obtained after its execution, and for which, in fact, the mortgagee was responsible as surety. At the sale, notice of the mortgage was publicly given. The object was to obtain the land at a low price for the mortgagor and his family; but the scheme being defeated, and the party solicited having given full value for the land, such mortgage cannot be recorded without saving his rights. *Ib.*
3. Where the security which an unrecorded mortgage gives to a debt, has been abandoned for other security given by the debtor, and accepted by the creditor, such mortgage will not be decreed to be recorded. - - - - - *Ib.*

See Executor and Administrator, 1.

NEGROES.

See Evidence, 16.

PATENT.

See Ejectment, 1, 2, 3.

PAYMENT OF DEBTS.

See Action, right of, 3.

— Evidence, 20.

— Executor and Administrator, 8.

— Pecuniary Legacies and Legatees, 1, 2, 3.

— Promissory Note, 10, 11, 12, 13, 14.

PECUNIARY LEGATEES AND LEGACIES.

1. A testator directed the whole of his real and personal estate, not specifically devised, to be sold on credit by his executors, and the proceeds applied to the payment of his debts and legacies. At the time of making his will, and at his death, he was indebted to E, one of his pecuniary legatees, to whom he devised a greater sum than he owed. In an action by E against the executors to recover the debt due to her from the testator: **HELD**, that her legacy was not to be taken as a satisfaction of the debt due her. *Edelen vs. Dent*, - - 185
2. The general rule of law that a pecuniary legacy, of an equal, or a larger amount, is to be taken as a satisfaction of a debt, is undeniable; but it is not an unbending rule, and not being much favored, is made to yield to slight circumstances. - - - - - *Ib.*
3. An express devise for the payment of debts and legacies—the creation of a fund for the payment of debts, and a charge of the legacy on that fund—if the legacy be uncertain, and made to depend upon a contingency—if the payment of the legacy be postponed by the will to a time subsequent to that, at which the debt is due and payable, or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, are each cases in which a legacy will not be considered as a satisfaction of the testator's debt. - - - - - *Ib.*

See Court of Chancery, 6.

PERSONAL ESTATE.

It is a very ancient and well established principle of our law, that the personal estate of a deceased debtor, shall be considered as the natural fund, for the payment of his debts, and must be first applied for that purpose. **PER BLAND CHAN'R.** *Simmons vs. Drury*, 32

PENALTY.

See Bonds, 2, 3, 4, 5.

PLEAS AND PLEADINGS.

1. G obtained judgment by confession against W, as executor, who there-

upon stayed execution by a writ of error and bond. While the case was pending in the appellate Court, the executor died, and the writ of error was abated. The executor, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* of the first deceased, did not find assets sufficient to discharge the debt. In an action upon W's testamentary bond, against his surety, for the use of G, a replication disclosing the above facts, was held sufficient on general demurrer and a compliance with the act of 1720, ch. 24. *Iglehart vs. State*, - - - - 235

2. In this case the defendant rejoined, "that the said executor had no goods or chattels which were of the deceased testator, at the time of his death in his hands to be administered, nor had at any time thereafter." HELD, on demurrer, that this rejoinder could not be received as a general plea, extending over the whole time from the death of the testator to the death of the executor, that no goods of the deceased ever came to the executor's hands; for its relative expressions "nor at any time thereafter" evidently indicated a particular point of time, when the executor was without goods or chattels with which to pay the debt, as they implied a period of time when he had such goods and chattels—that it could only be considered as a plea of *plene administravit*, or a substitute for such a plea, and as such, it was materially defective. *Ib.*

3. Upon general demurrer, it is the duty of the Court to look to, and adjudicate upon all the pleadings in the cause. - - - - *Ib.*

4. K sued out a writ of Replevin, gave the usual bond, and the sheriff replevied the goods demanded. Judgment being rendered against him, he appealed and filed the usual appeal bond conditioned to prosecute his appeal with effect, and satisfy the damages and costs awarded by the county and appellate Courts. Judgment was rendered against him upon the appeal. In an action upon his appeal bond the following questions were decided:

That a replication assigning as a breach "that the defendant did

not prosecute his appeal with effect to the damage of the plaintiff, &c." was sufficient upon general demurrer, was an answer to a plea of general performance, and a plea "that the defendant did prosecute his appeal with effect."

That a plea in bar "that the appellant paid the debt, damages and costs adjudged by the County Court, and all costs and damages that were awarded by the appellate Court," is defective upon general demurrer, being no answer to the judgment for a return of property and costs.

That a plea in bar "that the replevin bond was, after the recovery in the appellate Court, and before the institution of this action, sued against B, (the surety of K therein) to judgment, and that B satisfied the plaintiff for that judgment," is also defective upon general demurrer. The costs of the appellate Court are not paid by such satisfaction, nor does the plea show that the judgment of the County Court was satisfied before this action was brought. *Karthauss vs. Owings*, - - - - 430

5. Where a plea contains matters of fact, as well as matters of record, it should not conclude with a verification by the record, but with a verification to the country. - *Ib.*
6. A plea in bar must be a substantial and conclusive answer to the action. - - - - *Ib.*

See Appeal, 2.

— Executor and Administrator, 11.

— Indictment, 2.

— Insolvent Debtor, 1.

— Trover.

PLEADINGS IN EQUITY.

See Court in Chancery, 4, 5, 9, 10.

PRACTICE.

1. Questions upon which no evidence has been adduced, ought not to be submitted to a jury. *Allegre vs. Maryland Insurance Company*, 136
2. The existence of a usage, when evidence is offered for, and against it, is exclusively for the consideration of the jury. - - - - *Ib.*
3. When there is any legal admissible evidence tending to prove the issue in a cause, the effect of that evidence is solely for the jury. *Davis vs. Barney*, - - - - 382

4. When there is no evidence applicable to the issue, or tending to prove any material fact, there is a total failure of evidence, and the Court will direct the jury accordingly. - - - - - *Ib.*
 5. Where at the time a sheriff under a *fi. fa.* levied upon personal and real property, pointed out by the plaintiff as the property of the defendant, a claim was made thereto by third persons, who denied the right of the sheriff to levy upon or sell the same, and threatened to sue him if he should sell; and the sheriff then informed the plaintiff that unless he would indemnify him, he would not sell. Upon motion made at the return term of the writ, (founded upon the foregoing facts, sustained by affidavits and copies of deeds and mortgages from the defendant to the claimants, and proof of the plaintiff's refusal to indemnify the sheriff) the Court granted a rule absolute either to indemnify the sheriff, or permit him to enlarge the time of making his return, from term to term, until that was done; and again enlarged the time for making his return to the first day of the next term. *Jessop vs. Brown*, 404
 6. Where one of the arbitrators appointed under a rule of Court, had removed from the State, and many years had elapsed since his appointment, without an award being returned, the Court on motion reinstated the cause.—PER HARFORD COUNTY COURT. *Price vs. Tyson*, 475
- See Appeal, 1, 3, 4.
 — Contract, 4.
 — Evidence, 19.
 — Insolvent Debtor, 6.

PRACTICE IN CHANCERY.

Under the act of 1820, ch. 161, sec. 1, the Chancellor is not authorised to take a bill as confessed, and entirely disregard the testimony which the interlocutory order directed in that act to be passed, requires to be taken, under an *ex parte* commission to support the allegations of the bill. The final decree in such case must be sanctioned by the evidence taken under the commission. *Purviance and Dorson vs. Barton*, - - - - - 311

See Appeal, 5.

- See Court of Chancery, 3, 4, 5, 17, 18.
 — Dower, 7.
 — Limitation of Actions, 6.
 — Mayor and City Council of Baltimore, 1.

PRESUMPTION.

1. The law is well established, that facts to aid a title, may in some cases be presumed. *Shilknecht vs. Eastburn*, - - - - - 114
 2. The law will always lean to the presumption, that a trustee has faithfully executed his trust. *Ib.*
 3. Every fair legal presumption ought to be allowed in favor of a judicial sale, where the purchase money has been *bona fide* paid. - - - *Ib.*
 4. A trustee in the year 1795, under a decree of the Court of Chancery, sold certain real estate, and returned a report of the sale and proceedings, upon which the Chancellor passed the usual order of confirmation *nisi*. In 1803, the trustee executed a deed to the purchaser, which recited the sale, its ratification, and the payment of the purchase money. It did not appear from the record of the proceedings in Chancery, that the sale had been finally ratified. The deed of the trustee being relied upon as evidence of title in the year 1826, HELD, That the jury might, and ought to presume that the return of the sale, as reported by the trustee, had been finally ratified and confirmed. - - - - - *Ib.*
- See Promissory Note, 2.

PROMISSORY NOTE.

1. A promissory note given by a member of the vestry of a church, for a debt due, not by him in his individual character, but by the vestry, a corporate body, of which he was a member, without any consideration moving to himself, is a promise to pay the debt of another, without consideration, and void. *Rogers vs. Waters*, - - - - - 64
2. The fact, that a note was payable at a future day, where it appeared that it was made for the purpose of closing an account, for which the maker was not responsible independent of the note, does not furnish the slightest presumption that forbearance was purchased by it; for nothing is more common than the closing of accounts by passing notes

- payable at future days, without the consideration of forbearance being thought of. - - - - - *Ib.*
3. In an action against the endorser of an inland bill of exchange, payable after date, which had been protested for non-payment, and due notice thereof given to the defendant, a letter from the plaintiff to the administrator of the drawer of the bill, dated some time after the bill became due, was given in evidence by the defendant, which stated that the plaintiff "had agreed with the drawer to secure the amount of the said bill, and others, drawn by him and protested, by instalments, to wit, \$300 every sixty days, and requiring payment of two instalments then due"—HELD, that in the absence of proof of any consideration to support the agreement mentioned in the letter, the County Court erred in giving an unqualified instruction to the jury, that the defendant was discharged from all liability. *Planters' Bank vs. Sellman*, - - - - - 230
 4. The holder of a bill of exchange may by an agreement with the drawer to give him further time for payment, discharge an endorser. - - - - - *Ib.*
 5. But it is not every mere naked agreement, by the holder with the drawer for delay, that will discharge the endorser after he has been fixed in his responsibility by non-payment, and due notice given. - - - - - *Ib.*
 6. It is clear, both on principle and authority, that it must be a binding engagement, without the assent or concurrence of the endorser, and one that will suspend the holder's remedy, and restrain him from bringing suit against the drawer before the expiration of the time given, to the prejudice of the endorser, or so as to affect his rights. *Ib.*
 7. To do this, it must have a sufficient consideration to support it, otherwise it is *nudum pactum*, and does not affect or suspend the rights of any of the parties. - - - - - *Ib.*
 8. Where the agent of an endorsee, the holder of a promissory note, called upon the maker for the payment of the note, and the maker offered to pay the same in goods, which the agent declined receiving, having authority only to accept money, it is unnecessary in an action upon the note to prove either the hand writing of the maker or previous endorser; as the offer to pay the agent, amounted to an admission that every thing had been done necessary to the endorser's right to receive the money,—that there was no objection to his paying the note, and superseded the necessity of further proof. *Keplinger vs. Grifflth*, - - - - - 296
 9. A promissory note may be purchased without taking an endorsement as well after, as before suit brought. The purchaser has the beneficial, and the vendor the legal interest; and the suit may be carried on without entering the use.—*Williamson vs. Allen*, - - - 344
 10. The acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt, if it remains in the hands of the creditor unpaid, and he can produce it to be cancelled, or show it to be lost. But the creditor will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial, to be cancelled. *Glenn vs. Smith*, 493
 11. The acceptance by a creditor, of a note or bill of a third person, for a pre-existing debt, is no payment or extinguishment of such debt, unless the creditor parts with it, or is guilty of laches in not presenting it for payment in due time. *Ib.*
 12. In either of the above cases, an express agreement by the creditor to receive the note or bill absolutely as payment, and to run the risk of its being paid, is an extinguishment of the previous debt, whether the note or bill be afterwards paid or not. Such agreements are not to be implied from the use of the words "in payment of the above account," in a receipt for the note. - - - *Ib.*
 13. To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract that it should be so, must be shewn. - - - - - *Ib.*
 14. The acceptance of a note by a creditor for a precedent debt, is a suspension of his right of action until the note reaches maturity. *Ib.*

PURCHASER.

See Mortgage, 1, 2, 3.

RECEIVER.

See Court of Chancery, 14.

— Mayor and City Council of Baltimore, 1, 2.

RECORDS.

The records of our Courts of Justice are to be considered as public property, and so important is it to the community, that they should be made up correctly, and preserved with care, that when a neglect in these particulars occurs, an obligation is imposed on the State to supply the defect, and have the work done at the expense of the treasury. The defaults of the officers, are thus visited on the public, and their bonds afford the only means of security for the State to resort to against loss. *State vs. Wayman*, 254

REFERENCE.

See Abatement, 1, 2.

— Practice, 6.

REGISTER IN CHANCERY.

1. By the 49th article of the Constitution of Maryland, "all civil officers of the appointment of the Governor and Council, who do not hold commissions during good behavior, shall be appointed annually in the third week in November; but if any of them shall be re-appointed, they may continue to act without any new commission or qualification; and every officer though not re-appointed shall continue to act until the person who shall be appointed and commissioned in his stead shall be qualified." Under this clause, B was commissioned as Register in Chancery, in January, 1812, and gave bond on the 24th January, 1816, in conformity to the *Act of 1742, ch. 10*, the condition of which was such, that "if above bounden B, whilst he shall continue in the office of Register, shall," &c. discharge various enumerated duties, and that in ease of death, or that he shall be legally dismissed from officiating longer in the said office, he or his executors, &c. shall surrender to his successor all the records, &c. "made during the time he hath offi-

ciated in the said Register's Office." He continued to hold the office and discharge its duties without any re-appointment, until 1821, and omitted to record proceedings and decrees of the Court, of which it was his duty to keep records, during every year he was in office. These records were afterwards completed at the public expense, and an action was brought on his bond against his security, to recover the money expended by the State: HELD, that the bond was executed with an express reference to the provisions of the Constitution, and that its condition did not create a responsibility beyond them; that its object was to engage for a faithful discharge of duties as long as they could be legitimately performed under the official grant and no longer, and that the defendant was responsible under the bond for the conduct of B, as Register of the Court of Chancery, to the expiration of the third week in November, 1816. *State vs. Wayman*, 254

2. In an action upon the official bond of the Register of the Court of Chancery by the State, for omitting to make the proper record books, a recovery may be had for omissions to record proceedings in suits to which the State was not a party, and on account of which nothing was paid to such Register by the State. The measure of damages is the sum paid by the State for doing that, which the officer should have done. - - - - - *Ib.*

See Bonds, 2, 3, 4.

— Constitutional Law.

— Evidence, 1, 2, 15.

REMAINDER.

Since the act of 1786, a remainder limited by will to take effect upon the determination of an estate devised to "A and the heirs of his body lawfully begotten," is inoperative. *Wells vs. Beall*, - - 458

RENTS AND PROFITS.

Rents and profits are recoverable in equity from those who take possession of a minor's real estate. *Wells vs. Beall*, - - - - - 458

REPLEVIN.

See Evidence, 6, 20, 21.

REPRESENTATION.

See Insurance, 2.

SETT-OFF.

See Action, right of, 4.

— Evidence, 19, 22.

— Limitation of Actions, 6.

SHERIFF.

See Practice, 5.

SHIPS AND SHIPPING.

H chartered his vessel to W for a voyage to be made at and from B, to any port or ports in the West Indies, &c. and back to B, where the vessel was to be discharged, the dangers of the seas excepted; there was the usual covenant of seaworthiness on, and during the voyage in the charter-party; W agreed to pay a certain sum for each and every month, and so in proportion, for a less time, as the vessel should be continued on the voyage—in ten days after her return to B, or upon hearing of her loss; and also agreed, at his cost, to victual and man the vessel, and pay all port charges during the voyage. **HELD**, that this constituted a charter for one voyage, to commence at B and terminate on the return of the vessel—that *pro rata* freight was only due upon a loss proceeding from the dangers of the seas,—that the contract was an indivisible one,—and the return of the vessel to B, a condition precedent to the payment of freight. *Hamilton vs. Warfield*, 482

STATE OF MARYLAND.

See Insolvent Debtors, 6.

STATUTES.

See Acts of Assembly.

— Construction 1.

STATUTE OF FRAUDS.

A member of a corporation, may act as the agent of the Vendor and Vendee in making the memorandum required by the Statute of Frauds, at a public sale of the property of such corporation, made by such member as its agent. *Stoddert vs. Vestry of Port Tobacco Parish*, - - - 227

See Promissory Note, 1, 2.

SURETY.

The confession of a judgment by an executor is conclusive on him, as

well as to the debt confessed, as to the sufficiency of the assets to pay it; but in relation to his surety, in his testamentary bond, it is only *prima facie* evidence, either as to the debt, or sufficiency of assets to pay it. *Iglehart vs. State*, - 235

See Bonds, 2, 3, 4, 5.

— Register in Chancery, 1.

SURVIVORSHIP—OF ACTIONS.

See Abatement, 1, 2.

TAXES.

Mayor and City Council of Baltimore, 1, 2.

TIME.

How far material in a parol contract, *vide* Contract, 1.

Agreement to give, *vide* Promissory Note 4, 5, 6, 7.

TORTS.

See Assumpsit, 2.

TRESPASS.

In trespass for breaking the plaintiff's close, and cutting down his trees, if the plaintiff fail to prove the cutting his trees, he may still recover for the breach of his close. *Mundell vs. Perry*, - - - 193

TROVER.

In *trover* by a rightful executor against a wrongful one, for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debt; but under the general issue, he may give in evidence such payments, and they will be *recouped* in damages, if they be such as the plaintiff would have been bound to make, as when the debts are just, and there is no deficiency of assets. *Glenn vs. Smith*,

493

See Executor and Administrator, 6, 8.

TRUSTEE.

The law will always lean to the presumption that a trustee has faithfully executed his trust. *Shilknecht vs. Eastburn*, - - - 114

See Insolvent Debtor, 1, 2, 3, 4, 5.

TRUSTS.

See Court of Chancery, 1.

UNITED STATES.

See Contract, 7.

USAGE.

See Insurance, 4, 7.

USE AND OCCUPATION.

1. To maintain the action for use and occupation, it is not necessary for the plaintiff to prove an express contract with the tenant, when he first takes possession, nor an express reservation of a certain rent, nor that the tenant has paid rent. It may be maintained on an implied undertaking where the permissive holding is established; and if it appears that a certain rent was reserved, the reservation may be used to regulate the damages.—*Stockett vs. Watkins*, - - 326
2. If one enters as a trespasser, the action for use and occupation cannot be maintained. - - - *Ib.*

WILLS AND TESTAMENTS.

1. A Testator, after reciting in his will (which was executed in *Germany*) his intention to depart in a few days for *America*, "for the purpose of seeking his fortune," devised as follows: "He declares his deliberate will to be, that in case he should die unmarried in a foreign country, the small *Opeman* cottage, situate at D, should be re-

tained as heritable property, by his near relation G, the eldest daughter of I, farmer, at D, whom he hereby constitutes his sole heiress. She and her father, however, shall be held to pay to the three daughters of W and D," a certain sum, as a legacy. "To his guardian C, he devises the turf moor at, &c." After this the testator came to *Baltimore*, where he died unmarried, and without issue, leaving personal property. Held that upon the true construction of this will, G was entitled to the whole of the Testator's personal estate; as it was his intention by the words "*sole heiress*," to give her every thing he had, except the property specifically devised, in the event of his dying unmarried in a foreign country. *Seimers' vs. Seimer and Wife*, - 100

2. A devise to "A, and the heirs of his body, lawfully begotten," since the act of 1786, constitutes an estate in fee simple. A remainder, limited to take effect upon the determination of such an estate, is inoperative. *Wells vs. Beall*, 458
See Pecuniary Legacies and Legatees, 1, 2, 3.

WITNESS.

See Evidence, 2, 3, 7, 8.





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